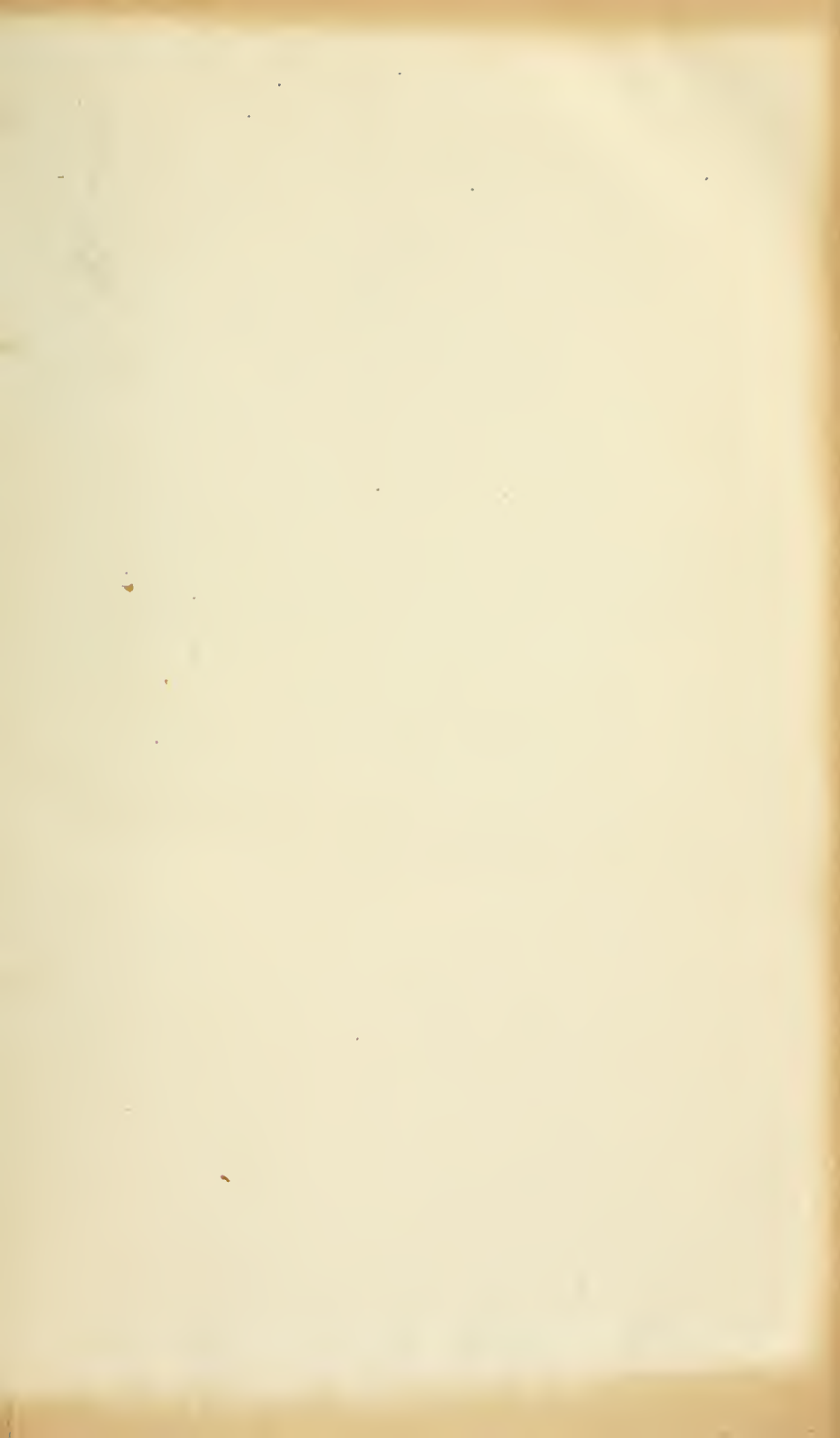




NEW JERSEY EQUITY REPORTS.

VOLUME XXXIX.

STEWART 12.

REPORTS
—OF—
CASES DECIDED IN
THE COURT OF CHANCERY,
THE PREROGATIVE COURT,
AND, ON APPEAL, IN
The Court of Errors and Appeals,
OF THE
STATE OF NEW JERSEY

JOHN H. STEWART, REPORTER.

VOL. XII.

TRENTON, N. J.:
THE W. S. SHARP PRINTING CO.
1885.

✓

F. m. Lib.

Y. F. 11

1848

. A2

v. 39

Entered, according to act of Congress, in the year 1885, by
JOHN H. STEWART,
In the office of the Librarian of Congress at Washington. D. C.

CHANCELLOR
DURING THE PERIOD OF THESE REPORTS,
HON. THEODORE RUNYON.

VICE-CHANCELLORS.
HON. ABRAHAM V. VAN FLEET.
HON. JOHN T. BIRD.

CLERK IN CHANCERY.
GEORGE S. DURYEE, Esq.
iii

JUDGES OF THE COURT OF ERRORS AND APPEALS.

EX-OFFICIO JUDGES.

HON. THEODORE RUNYON, CHANCELLOR.

“ MERCER BEASLEY, CHIEF-JUSTICE.

“ DAVID A. DEPUE,

“ BENNET VAN SYCKEL,

“ EDWARD W. SCUDDER,

“ MANNING M. KNAPP,

“ JONATHAN DIXON,

“ ALFRED REED,

“ WILLIAM J. MAGIE,

“ JOEL PARKER,

} Associate Justices
of the
Supreme Court.

JUDGES SPECIALLY APPOINTED.

HON. JONATHAN S. WHITAKER,

“ JOHN CLEMENT,

“ WILLIAM PATERSON,

“ HENDRICK U. BROWN,

“ CALEB S. GREEN,

“ MARTIN COLE.

CLERK.

HENRY C. KELSEY, Esq.

NOTE.

This volume, 39th New Jersey Equity Reports (12th Stewart), contains the opinions delivered in the Court of Chancery and Prerogative Court at October Term, 1884, and February Term, 1885, and also the opinions delivered in the Court of Errors and Appeals, on appeal, at November Term, 1884, and March Term, 1885.

By the Chancellor's direction, the opinions in the following cases at the foregoing terms have not been published :

Kissam v. West Orange; Smith v. Reed; Field v. West Orange (V. C. Van Fleet).

NEW JERSEY REPORTS

WITH THEIR ABBREVIATIONS.

LAW REPORTS.

COXE, 1790-1795, ...	1 vol.
PENNINGTON (PEN.), 1806-1813, ...	2 "
SOUTHARD (SOUTH.), 1816-1820, ...	2 "
HALSTED (HAL.), 1821-1831, ...	7 "
GREEN (GR.), 1831-1836, ...	3 "
HARRISON (HARR.), 1827-1842, ...	4 "
SPENCER (SPEN.), 1842-1846, ...	1 "
ZABRISKIE (ZAB.), 1847-1855, ...	4 "
DUTCHER (DUTCH.), 1855-1862, ...	5 "
VROOM (VR.), 1862-	17 "

EQUITY REPORTS.

SAXTON (SAX.), 1830-1832, ...	1 vol.
GREEN (GR. CH.), 1838-1845, ...	3 "
HALSTED (HAL. CH.), 1845-1852, ...	4 "
STOCKTON (STOCK.), 1852-1858, ...	3 "
BEASLEY (BEAS.), 1858-1861, ...	2 "
MCCARTER (MCCART.), 1861-1862, ...	2 "
C. E. GREEN (C. E. GR.), 1863-1877, ...	12 "
STEWART (STEW. EQ.), 1877-	12 "

CASES REPORTED.

A.

Albertson, Neale v.....	382
American Dock Co. v. Trustees...	409
Applegate v. Tyson.....	365
Atlantic City, Atlantic City Water Works v.....	367
Atlantic City Gas Co., Crammer v.....	76
Atlantic City Water Works v. Atlantic City.....	367

B.

Baker v. Galpin.....	491
Baker v. Johnston.....	493
Ballentine v. De Camp.....	87
Banta v. Trustees.....	123
Barrell v. Barrell.....	603
Beatty v. Trustees of Cong. Soc....	452
Berrian, Chetwood v.....	263, 517
Besson v. Gribble.....	111
Black v. Foljambe.....	234
Booraem v. North Hudson R. R....	465
Bracken v. Smith.....	169
Brady v. McBride.....	495
Buckingham, Ludlum v.....	564
Burrell v. Massey.....	595
Byard v. Conover.....	244

C.

Cane v. Cane.....	148
Cary v. Cary.....	3, 20
Cary, Third Nat. Bank v.....	25
Champion, Williams v.....	350
Chancellor v. Gummere.....	582
Chetwood v. Berrian.....	263, 517
Chew v. Cook.....	396
Church of St. Francis v. Har- gous.....	339

Clinton Bank v. Cummins.....	577
Codman, Dey v.....	253
Colthar v. North Plainfield.....	380
Combs, Davis v.....	336
Conover, Byard v.....	244
Cook, Chew v.....	396
Cooper, Maps v.....	316
Corning, Kirkpatrick v..	22, 136
Crammer v. Atlantic City Gas Co.....	76
Cubberly v. Cubberly.....	514
Cuming v. Robins..	46
Cummins, Clinton Bank v.....	577

D.

Davis v. Combs.....	326
Davis v. Davis.....	13
De Camp, Ballentine v.....	87
Dellicker, Matthews v.....	90
Demarest v. Vandemburgh.....	130
Dey v. Codman.....	258
Dissinger's Case.....	227
Dodd, Una v.....	173
Dolan, Lee v.....	193
Domestic Telegraph Co. v. Met- ropolitan Telephone Co.....	160
Downie, Knowles v.....	594
Dunning, Kelly v.....	482

E.

Eckerson v. McCulloh.....	115
Ernst v. Morgan.....	391

F.

Farmer v. Farmer.....	211
Field v. West Orange.....	60
Foljambe, Black v.....	244

Freehold and N. Y. R. R. v. Hodgson.....	518
Freiknecht v. Meyer.....	551
Frome, Hance v.....	324

G.

Gaines v. Smith.....	545
Gallagher, Lillis v.....	93
Galpin, Baker v.....	491
Gardner v. Gardner.....	337
Garwood v. Hartley.....	78
Gatzmer v. Philadelphia and At- lantic City R. R. Co.....	363
Gray v. Gray.....	332, 511
Gribble, Besson v.....	111
Gulick v. Gulick.....	401, 516
Gummere, Chancellor v.....	582
Gummere, Smith v.....	27, 394

H.

Hance v. Frome.....	324
Hand, Rogers v.....	270
Hard v. Turnure.....	121
Hargous, Church of St. Francis v.....	339
Hartley, Garwood v.....	78
Hassell v. Van Houten.....	105, 113
Hayes, Parker v.....	469
Hendrickson v. Wooley.....	307
Hill v. Millville Ins. Co.....	66
Hoagland, Titus v.....	294
Hodgson, Freehold and N. Y. R. R. Co. v.....	518
Hodgson, Lowrey v.....	518
Holcombe v. Holcombe.....	592
Houston v. Houston.....	146
Hunt, Shields v.....	485
Hutchinson, Trenton Board of Health v.....	218, 569

J.

Jackson v. Reynolds.....	313
James, Keen v.....	527
Jeffrey, Watson v.....	62

Johnston, Baker v.....	493
Jones, Smock v.....	16

K.

Keen v. James.....	527
Kelly v. Dunning.....	482
Kerr v. Little.....	83
Kinman v. Wight.....	501
Kirchner v. Miller.....	355
Kirkpatrick v. Corning.....	21, 136
Knowles v. Downie.....	594

L.

Lanier, Sherman v.....	245
Larison v. Polhemus.....	303
Larison, Yard v.....	386
Lee v. Dolan.....	193
Lillis v. Gallagher.....	93
Lister, Smith v.....	595
Little, Kerr v.....	83
Lowrey v. Hodgson.....	527
Ludlum v. Buckingham.....	564

M.

McBride, Brady v.....	495
McCartin v. Perry.....	193
McCulloh, Eckerson v.....	115
Maps v. Cooper.....	316
Massey, Burrell v.....	595
Matthews v. Dellicker.....	90
Merchant's Case.....	506
Metropolitan Telephone Co., Do- mestic Telegraph Co. v.....	160
Meyer, Freiknecht v.....	551
Miller, Kirchner v.....	355
Millville Ins. Co., Hill v.....	66
Ming's Case.....	1
Morgan, Ernst v.....	391
Morgan, Gibbs v.....	79, 126
Morris, Wiley v.....	97
Mount v. Slack.....	230

N.

Neale v. Albertson.....	382
New York and G. L. R. R. Co. v. Stanley.....	361

North Hudson Co. R. R., Boor-	
aem v.....	465
North Plainfield, Colthar v.....	380

O.

Osborne, Woolley v.....	54
Osmun v. Porter.....	141

P.

Palmateer v. Tilton.....	40
Parker v. Hayes.....	469
Pedrick v. Pedrick.....	591
Perry, McCartin v.....	198
Philadelphia and Atlantic City R.	
R. Co., Gatzmer v.....	363
Pinkney, Terhune v.....	494
Polhemus, Larison v.....	303
Porter, Osmun v.....	141
Post, Van Houten v.....	51

R.

Reynolds, Jackson v.....	313
Robins, Cuming v.....	46
Rogers v. Hand.....	270

S.

Shann, Van Duyne v.....	6
Sharp v. Wyckoff.....	95, 376
Sherman v. Lanier.....	249
Shields v. Hunt.....	485
Slack, Mount v.....	230
Smith, Bracken v.....	169
Smith, Gaines v.....	545
Smith v. Gummere.....	27, 394
Smith v. Lister.....	595
Smock v. Jones.....	16
Stanley, N. Y. and G. L. R. R.	
Co. v.....	361
Stoutenburgh, Wharton v.....	299

T.

Terhune v. Pinkney.....	494
Third National Bank v. Cary.....	25
Tilton, Palmateer v.....	40
Titus v. Hoagland.....	294
Trenton Board of Health v.	
Hutchinson.....	218, 569
Trustees, American Dock Co. v....	409
Trustees, Banta v.....	123
Trustees, Beatty v.....	452
Turnure, Hard v.....	121
Tyson, Applegate v.....	365

U.

Una v. Dodd.....	173
------------------	-----

V.

Vandenburgh, Demarest v.....	130
Van Duyne v. Shann.....	6
Van Houten, Hassell v.....	105, 113
Van Houten v. Post.....	51

W.

Watson v. Jeffery.....	62
West Orange, Field v.....	60
Wharton v. Stoutenburgh.....	299
Wight, Kinman v.....	501
Wiley v. Morris.....	97
Williams v. Champion.....	350
Woolley, Hendrickson v.....	307
Woolley v. Osborne.....	54
Wyckoff, Sharp v.....	95, 376

Y.

Yard v. Larison.....	386
----------------------	-----

CASES CITED.

A.

Agar v. Fairfax.....	2 ^d Lead. Cas. in Eq. 880.....	555
Agens v. Newark.....	8 Vr. 415.....	265
Aikman v. Aikman.....	7 Jur. (N. S.) 1017.....	285
Allen v. Allen.....	6 Rob (La.) 104.....	288
American Dock Co. v. Trustees.....	8 Stew. Eq. 181, 10 Stew. Eq. 266, 438, 555	
Anderson, In re.....	2 C. E. Gr. 536.....	35
Arnold v. Mundy.....	1 Hal. 1.....	412
Astley v. Astley	1 Hagg. 714.....	151
Aston's Case.....	5 Whart. 228.....	494
Atty.-Gen. v. D. & B. R. R.....	12 C. E. Gr. 1.....	573
Atty.-Gen. v. M. & E. R. R.....	4 C. E. Gr. 386.....	468
Atty.-Gen. v. Stevens.....	Sax. 370.....	425
Atwater v. West.....	1 Stew. Eq. 361.....	11
Ayres v. Hartford Ins. Co.....	17 Iowa 176.....	75

B.

Baker v. Mellish.....	11 Ves. 68.....	24
Bank of New York v. Bank of Ohio....	29 N. Y. 619.....	209
Barnes v. Haynes.....	13 Gray 188.....	400
Barwick v. English Co.	L. R. (2 Eq.) 259.....	543
Battle v. Rochester City Bank.....	5 Barb. 414.....	586
Beekman v. Hoboken Bank.....	10 Stew. Eq. 331... ..	96
Benedict v. Gilman.....	4 Paige 58.....	11
Benedict v. Smith.....	10 Paige 126.	210
Bentley v. Long Dock Co.	1 McCart. 480.....	546
Bentley v. Whittemore.....	3 C. E. Gr. 366.....	558
Billage v. Southee.....	9 Hare 534.....	216
Bixby v. Whitney.....	5 Mo. 192.....	195
Black v. D. & R. C. Co.....	9 C. E. Gr. 455.....	427
Bowlsby v. Speer.....	2 Vr. 351.....	483
Boyd v. McLean.....	1 Johns. Ch. 582.....	49
Bradish v. Gibbs.....	3 Johns. Ch. 523.....	216
Bremer v. Freeman.....	10 Moore P. C. 306.....	286
Bright v. Boyd.....	1 Story C. C. 478.....	359, 450
Brinkley v. Brinkley.....	47 N. Y. 40	302
Brooks v. Lewis.....	2 Beas. 214.....	115
Brown v. Brown.....	6 Stew. Eq. 650.....	165

Brown v. Galloway.....	Pet. C. C. 291.....	440
Brown v. Montgomery.....	20 N. Y. 287.....	542
Browne v. Lockhart.....	10 Sim. 420.....	379
Bruce v. Ruler.....	2 M. & Ry. 3.....	542
Bryden v. Willett.....	L. R. (7 Eq.) 472.....	89
Buck v. Buck.....	2 Vt. 417.....	195
Bullock v. Downes.....	9 H. of L. 1.....	122
Bunnell v. Collinsville Sav. Soc.....	38 Conn. 203.....	183
Burroughs's Case.....	1 Gr. 284.....	546

C.

Cadwalader v. Howell.....	3 Harr. 144.....	285
Cairnes v. Bleecker ...	12 Johns. 300.....	210
Campbell v. Board.....	16 Vr. 248.....	575
Cape May & S. R. R. v. Johnson	8 Stew. Eq. 422.....	180
Champlin v. Laytin.....	6 Paige 189.....	558
Chilver v. Weston.....	12 C. E. Gr. 435.....	11
Chiswell v. Morris.....	1 McCart. 101.....	145
Clarke v. Coble.....	2 Cox 173	478
Clarke v. Johnson.....	2 Stock. 287.....	298
Clifton v. Cockburn.....	3 M. & K. 76.....	559
Coite v. Soc. for Savings.....	32 Conn. 173.....	183
Colfax v. Colfax.....	5 Stew. Eq. 206.....	43
Columbia Ins. Co. v. Cooper.....	50 Pa. St. 831.....	75
Condit v. Blackwell.....	7 C. E. Gr. 481.....	216
Conover v. Wardell.....	7 C. E. Gr. 492.....	540
Cooper v. Phibbs.....	17 Ir. Ch. 73.....	559
Cowee v. Cornell.....	75 N. Y. 91.....	216
Cross v. Del Valle.....	1 Wall. 1.	141
Culver v. Brown	1 C. E. Gr. 533.....	314
Cutler v. Tuttle.....	4 C. E. Gr. 549.	49
Cutting v. Dana.....	10 C. E. Gr. 265.....	164

D.

Dale v. McEvers.....	2 Cow. 118.....	11
Darlington v. Speakman.....	9 W. & S. 182.....	125
Davis v. Duncan.....	23 Am. Law Reg. (N. S.) 582.....	85
Day v. Bergen.....	53 N. Y. 404.....	180
Day v. Sharp	4 Whart. 339.....	124
Decker v. Caskey.....	Sax. 427	555
Del. & R. C. Co. v. Del. & R. B. Co.....	2 McCart. 13.....	376
Del. & R. C. Co. v. R. & D. B. R. R.....	1 C. E. Gr. 321.....	427
Derham v. Lee.....	87 N. Y. 599.....	194
Dewey v. Moyer.....	72 N. Y. 70.	201
Dolman v. Cook.....	1 McCart. 56.....	506

Dorsheimer v. Roorback.....	3 C. E. Gr. 438.....	132
Douglas v. Douglas.....	L. R. (12 Eq.) 617.....	285
Dubuque & P. R. R. v. Litchfield.....	23 How. 66.....	427
Duffield v. Whitlock.....	26 Wend. 55.....	166
Dupuy v. Wurtz.....	53 N. Y. 556.....	286
Durell v. Haley	1 Paige 492.....	541

E.

Earl v. De Hart.....	1 Beas. 280.....	484
Earl Beauchamp v. Winn.....	L. R. (6 H. L.) 223.....	560
Earl of Clarendon v. Hornby.....	1 P. Wms. 446.....	546
Edwards v. Mitchell.....	1 Gray 239.....	579
Ehler v. Turner.....	8 Stew. Eq. 68	170
Evans v. Bogshaw.....	L. R. (8 Eq.) 469.....	546
Evernham v. Hulit.....	16 Vr. 53.....	575
Evroy v. Nicholas.....	2 Eq. Cas. Abr. 488.....	478
Exchange Bk. v. Monteath.....	26 N. Y. 505.....	209

F.

Farmers & M. Bk. v. Butchers & D. Bk.....	16 N. Y. 154.....	208
Farnsworth v. M. & P. R. R. Co.....	92 U. S. 49.....	418
Field v. Schieffelin.....	7 Johns. Ch. 150.....	534
Field v. Seabury.....	19 How. 323.....	418
Field v. Silo.	15 Vr. 355.....	171
Field v. West Orange	9 Stew. Eq. 118.....	483
Field v. West Orange.....	10 Stew. Eq. 434.....	61
Fisher v. Prowse.....	2 B. & S. 770.....	467
Flock v. Holm.....	1 J. & W. 414.....	5
Ford v. Ford	2 Mart. (N. S.) 574.....	288
Foulke v. Bond.	12 Vr. 527.....	65
Fox v. Lambson.....	3 Hal. 275.....	215
Freeholders v. Stevenson.....	17 Vr. 173.....	129, 394

G.

Galatian v. Erwin.....	Hopk. 48.....	141
Garrison, In re.....	2 McCart. 393.....	489
Garwood v. Eldridge.	1 Gr. Ch. 145.....	558
Gaskarth v. Lord Lowther.....	12 Ves. 107.....	167
Gest v. Flock.....	1 Gr. Ch. 108.....	389
Gibbs v. Morgan.....	12 Stew. Eq. 126.....	392
Glasby v. Morris.....	3 C. E. Gr. 72.....	572
Glenn v. Glenn.....	47 Ala. 204.....	288
Glenny v. Langdon	98 U. S. 20.....	201

Godfrey v. Watson.....	3 Atk. 517.....	12
Gough v. Bell.....	2 Zab. 441, 3 Zab. 624.....	412
Grant v. Grant.....	3 Russ. 598.....	5
Gray v. Gray.....	(MS.) N. J.....	506
Green v. M. & E. R. R. Co.....	1 Beas. 165.....	560
Grigbley v. Cox.....	1 Ves. Sr. 517.....	215
Griswold v. Haven.....	25 N. Y. 595.....	209

H.

Haggerty v. McCanna.....	10 C. E. Gr. 48.....	229, 561
Haldane v. Eckford.....	L. R. (8 Eq.) 631.....	285
Hall v. Nicholson.....	Stew. Dig. 434.....	24
Hamilton v. Dallas.....	L. R. (1 Ch. Div.) 257.....	286
Hampton v. Nicholson.....	8 C. E. Gr. 423.....	558
Hamray v. McIntire.....	11 Ves. 54.....	5
Hannon v. Williams.....	7 Stew. Eq. 255.....	183
Hartshorne v. Hartshorne.....	1 Gr. Ch. 349.....	555
Hassell v. Van Houten.....	12 Stew. Eq. 113.....	107
Hatch v. Hatch.....	9 Ves. 292.....	216
Hayes v. Stiger.....	2 Stew. Eq. 196.....	558
Hedden v. Hedden.....	6 C. E. Gr. 61.....	158
Hillyer v. Schenck.....	2 McCart. 398.....	282
Hoagland v. Culvert.....	Spen. 387.....	224
Hoagland v. Hall.....	9 Vr. 350.....	588
Hoboken L. & I. Co. v. Hoboken.....	7 Vr. 540.....	468
Hodges v. Hodges.....	9 Mass. 320.....	195
Holmes v. Jersey City..	1 Beas. 299.....	467
Hopper v. Hopper.....	2 Zab. 715.....	490
Houghwout v. Murphy.....	7 C. E. Gr. 531.....	587
Howard v. Pitt.....	1 Salk. 261.....	124
Howard Ins. Co. v. Bruner.....	23 Pa. St. 50.....	75
Hughes v. Wilkinson.....	37 Miss. 482.....	124
Hunt v. Lambertville.....	16 Vr. 279.....	571
Hunt v. Maybury.....	5 Dutch. 403.....	258
Huntington v. Sav. Bank.....	96 U. S. 388.....	183
Hurlburt v. Durant.....	88 N. Y. 121.....	494
Hyde v. Whitfield.....	19 Ves. 342.....	5

I.

Industrial Sch. Dist. v. Whitehead.....	2 Beas. 290.....	421
Ingersoll v. Ingersoll.....	9 Stew. Eq. 127.....	264
Ireland v. Livingston.....	L. R. (5 E. & I. App.) 395.....	207
Isham v. Del., L. & W. R. R.....	3 Stock. 227.....	408

J.

Jersey City v. J. C. & B. R. R.....	5 C. E. Gr. 360.....	421
Jewell v. West Orange.....	9 Stew. Eq. 403.....	61
Johnson v. Eicke.....	7 Hal. 316.....	314
Johnson v. Towsley.....	13 Wall. 72.....	419
Johuson v. Van Horn.....	16 Vr. 136.....	61

K.

Kearney, Ex parte.....	7 Wheat. 38.....	180
Kennedy v. McKay.....	14 Vr. 288.....	535, 540
Kiddall v. Trimble.....	8 Gill 207.....	488
King v. Eatington.....	4 T. R. 177.....	264
King v. Foxwell.....	L. R. (3 Ch. Div.) 518.....	285
King v. M. & E. R. R.....	3 C. E. Gr. 397.....	573
Kirkpatrick v. Corning.....	{ 10 Stew. Eq. 54, 11 Stew. Eq. 234, 23, 523, 519, 137	137
Kirrigan v. Kirrigan.....	12 Stew. Eq. 22.....	137
Kirrigan v. Kirrigan.....	2 McCart. 146.....	5
Kneeland v. Emsley.....	Meigs 620.....	288

L.

Lathrop v. Smalley.....	8 C. E. Gr. 192.....	494
Leavenworth R. R. v. U. S.....	92 U. S. 733.....	434
Le Breton v. Nouchet.....	3 Mart. (La.) 60.....	288
Leitch v. Wells.....	48 N. Y. 585.....	534
Lembeck v. Jersey City.....	4 Stew. Eq. 255.....	61
Liddel v. McVickar.....	6 Hal. 44.....	314
Lloyd v. Smith.....	13 Sim. 457.....	550
Lord v. Calvin.....	5 Jur. (N. S.) 351.....	285
Loveday v. Hopkins.....	Amb. 273.....	15
Lovett v. Demarest.....	1 Hal. Ch. 113.....	554

M.

Macdonough v. Gaynor.....	3 C. E. Gr. 249.....	4
McCahill v. Equitable Soc.....	11 C. E. Gr. 531.....	125
McCormick v. Knox.....	105 U. S. 122.....	11
McKelway v. Armour.....	2 Stock. 115.....	358, 450
McKibbin v. Brown.....	1 McCart. 1.....	164
McLaughlin v. McLaughlin.....	7 C. E. Gr. 505.....	490
Magie v. Germ. Evan. Church....	2 Beas. 77.....	343
Malleable Iron Works v. Phœnix Ins. Co.....	25 Conn. 465.....	75
Marsh v. Marsh.....	1 C. E. Gr. 391.....	24

Martin v. Morgan.....	1 Brod. & B. 239.....	541
Martin v. Waddell	16 Pet. 367..	412
Mason v. Horner	105 Mass. 116.....	288
Methodist Church v. Hoboken....	4 Vr. 13.....	467
Meeker v. Vanderveer.....	3 Gr. 392.....	275
Meeks v. Olpherts	100 U. S. 564.....	202
Middleton v. Middleton	8 Stew. Eq. 115.....	506
Middleton v. N. J. W. L. R. R.....	10 C. E. Gr. 306.	523
Midmer v. Midmer.....	11 C. E. Gr. 299.....	49
Miller v. Garlock.....	8 Barb. 153.....	400
Mingus v. Condit.....	8 C. E. Gr. 313	580
Minter v. Crommelin	18 How. 87.....	442
Mitchell v. Holmes.....	1 Md. Ch. 287	494
Mouroe v. Perkins.	9 Pick. 298.....	379
Morris C. & B. Co. v. C. R. R. Co.....	1 C. E. Gr. 419	427
Morris & E. R. R. v. C. R. R. Co.....	2 Vr. 205.	429
Mount v. Van Ness.....	7 Stew. Eq. 523.....	232
Moore v. Hagerman.....	92 N. Y. 521.....	287
Moyer v. Dewey.....	103 U. S. 301.....	201
Murphy v. Briggs.....	89 N. Y. 446.....	581

N.

Naylor v. Winch	1 S. & S. 555.....	559
Newark Sav. Inst. Case.....	1 Stew. Eq. 552.....	176, 183
Newburgh Turnpike Co. v. Miller.....	5 Johns. Ch. 101.....	376
N. Y., L. E. & W. R. R. v. Yard.....	14 Vr. 632	413
Nichols v. Disner... ..	5 Dutch. 293.....	124
Norcum v. Rogers.....	1 C. E. Gr. 484.....	132
North River Bk. v. Aymar.....	3 Hill 262	208
Norwich Gas Co. v. Norwich City Gas Co.....	25 Conn. 19.....	374

O.

Ockenden v. Henly.....	El., Bl. & El. 485.....	589
O'Connor v. Spaight.....	1 Sch. & Lef. 305.....	57
Ogden v. Gibbons.....	4 Johns. Ch. 150.. ..	376
Oliver v. Mut. Marine Ins. Co.....	2 Curt. 277.....	75
Orton's Trust.....	L. R. (3 Eq.) 375.....	89
Overton v. Banister.....	3 Hare 503.....	479

P.

Palmer v. Temple.....	9 Ad. & El. 503.....	586
Palys v. Jewett.....	5 Stew. Eq. 302.....	84, 556
Parker v. Child.....	10 C. E. Gr. 41.....	11

Parker v. Hayes.....	8 C. E. Gr. 186.....	470
Parker v. Parker.....	1 Beas. 105.....	5
Parsons v. Bigwold.....	13 Sim. 518.....	75
Partridge v. Haycroft.....	11 Ves. 570.....	553
Payne v. Mahon.....	15 Vr. 213.....	574
Penn. R. R. v. N. Y. & L. B. R. R.....	8 C. E. Gr. 157.....	426
People v. Staton.....	73 N. C. 546.....	224
People v. Sturtevant.....	9 N. Y. 263.....	180
People v. White.....	24 Wend. 520.....	224
Perth Amboy ads. Smith.....	4 Harr. 52.....	223
Perth Amboy Co. v. Condit.....	1 Zab. 659.....	533
Phoenix Ins. Co. v. Hoffemier.....	46 Miss. 645.....	76
Pilling v. Armitage.....	12 Ves. 78.....	359, 450
Plumb v. Cataraugus Ins. Co.....	18 N. Y. 392.....	65
Polk v. Wendell.....	5 Cranch 87.....	440, 449
Pope v. Union.....	3 C. E. Gr. 282.....	468
Porter v. Spencer.....	2 Johns. Ch. 169.....	58
Porter v. Woodruff.....	9 Stew. Eq. 174.....	216
Potts v. Whitehead.....	5 C. E. Gr. 55.....	164
Prudden v. Lindsley.....	2 Stew. Eq. 615.....	451
Putnam v. Ritchie.....	6 Paige 390.....	561

R.

Rabbeth v. Squire.....	4 De G. & J. 406.....	264
Ramsden v. Dyson.....	L. R. (1 H. of L.) 129.....	359
Randolph v. Larned.....	12 C. E. Gr. 557.....	223
Rawdon v. Blatchford.....	1 Sandf. Ch. 344.....	541
Reed, Ex parte.....	100 U. S. 13.....	180
Rhodes v. Bate.....	L. R. (1 Ch. App.) 252.....	216
Richards v. Hammer.....	13 Vr. 435.....	129, 393
Richards v. West.....	2 Gr. Ch. 456.....	180
Ritter's Appeal.....	23 Pa. St. 95.....	275
Roberts v. Jersey City.....	1 Dutch. 525.....	413
Robinson v. Sykes.....	23 Beav. 40.....	89
Roche v. Jersey City.....	11 Vr. 257.....	172
Rogers v. Ingham.....	L. R. (3 Ch. Div.) 351.....	559
Rogers v. Potter.....	3 Vr. 278.....	488
Ross v. Ross.....	20 Beav. 645.....	89
Rowley v. Empire Ins. Co.....	36 N. Y. 550.....	75
Russell v. Asby.....	5 Ves. 98.....	4
Russell v. East Anglican R. R. Co.....	3 Macn. & G.....	104, 180
Russell v. Jersey Co.....	15 How. 426.....	412

S.

Salter v. Williamson.....	1 Gr. Ch. 480.....	298
Samson v. Smiley.....	13 Wall. 91.....	419

Savage v. Ball	2 C. E. Gr. 142.....	224
Savile v. Savile.....	1 P. Wms. 745.....	584
Scheider v. Ramsey.....	(MS.) N. J.....	589
Schomp v. Schenck.....	11 Vr. 195.....	109
Schulenberg v. Harriman	21 Wall. 44.....	418
Seeley v. Price.....	1 Hal. Ch. 231.....	24
Selliman v. Bowen.....	8 Gill & J. 50.	488
Shotwell v. Denman.....	Coxe 174.....	379
Shultz v. Sanders.....	11 Stew. Eq. 54.....	125
Skingsley, In re.....	3 Macn. & G. 221.....	102
Smelting Co. v. Kemp.....	104 U. S. 636.....	441
Smith v. Burnet	7 Stew. Eq. 219.....	253
Smith v. Whiting.....	11 Mass. 445.....	195
Snipe v. Shiner	15 Vr. 206.....	574
Sooy v. State.....	12 Vr. 394.....	534
Spencer v. Sapsley.....	20 How. 264.....	418
State v. Cincinnati Gas Co.....	18 Ohio St. 262.....	374
State v. G. & P. R. Co	15 Vr. 496.....	430
State v. Milwaukee Gas Co.....	29 Wis. 454.....	374
State v. Morris & E. R. R.....	1 Dutch. 437.....	573
State v. Perkins.....	4 Zab. 409.....	224
State v. Tolan.....	4 Vr. 195.....	224
Steel v. Smelting Co.....	106 U. S. 447.....	441
Stevens v. Enders.	1 Gr. 271.....	547
Stevens v. P. & N. R. R. Co.....	5 Vr. 532.....	412, 426
Stevenson v. Vosseller	14 Vr. 553.....	171
Stines v. Hayes	9 Stew. Eq. 364.....	560
Stockton v. Mech. & B. Sav. Bank.....	5 Stew. Eq. 163.....	183
Stone v. Godfrey	5 De G., M. & G. 76.....	559
Stryker v. Vanderveer.....	1 Dutch. 482.....	379
Stupilton v. Stupilton	2 Lead. Cas. in Eq. 1675.....	559
Swanger v. Gardner	3 De G. & S. 696.....	556

T.

Tasto v. Klopping.....	14 Vr. 448.....	556
Tate v. Williamson.....	L. R. (1 Eq.) 528.....	216
Thompson v. Egbert.....	2 Harr. 459.....	143
Thornton v. Court.....	3 De G., M. & G. 293.....	555
Tichenor v. Allen	13 Gratt. 15.....	201
Tompkins v. Tompkins	6 C. E. Gr. 538.....	379
Torrey v. Buck.....	1 Gr. Ch. 366.....	542
Townsend v. Bissell.....	6 Thomp. & C. 565.....	400
Townsend v. Brown.....	4 Zab. 80.....	412, 434, 427
Trimble v. Woodhead.....	102 U. S. 647.....	201
Trustees v. Trenton.....	3 Stew. Eq. 667.....	3

U.

Udny v. Udny	L. R. (1 Sc. App.) 441	235
Union ads. Durkes.....	9 Vr. 21.....	483
U. S. v. Aredondo.....	6 Pet. 691.....	426
U. S. v. Tyner	11 Wall. 88.....	172
Unity Bank, Ex parte.....	3 De G. & J. 63.....	478

V.

Vanderhaise v. Hugues.....	2 Beas. 410.....	562
Vanderkemp v. Sheldon.....	11 Paige 28.....	12
Vanderveer v. Stryker.....	4 Hal. Ch. 175.....	24
Van Doren v. Robinson.....	1 C. E. Gr. 256.....	167
Van Houten v. Pine.....	11 Stew. Eq. 72.....	106, 114
Van Riper v. Parsons.....	11 Vr. 123.....	575
Vianna v. Barclay.....	3 Cow. 281.....	210
Voorhees v. Voorhees.....	3 C. E. Gr. 223.....	447
Vreeland v. Vreeland.....	1 C. E. Gr. 512.....	274

W.

Wade v. Miller	3 Vr. 296	519, 523
Walker v. Union.....	4 Vr. 350.....	574
Walker v. Walker.	82 N. Y. 260.....	302
Wanner v. Sisson	2 Stew. Eq. 141.....	560
Webster v. Lee.....	5 Mass. 334.....	195
Weller v. Rolason.....	2 C. E. Gr. 13.....	560
Westfield Bk. v. Cornen	37 N. Y. 320.....	209
Wharton v. Stoutenburgh.....	8 Stew. Eq. 266.....	300
Whicker v. Hume.....	13 Beav. 401.....	291
White v. Burnley.....	20 How. 235	418
White v. Dummer.	1 Gr. Ch. 527.....	24
Whitlock v. Duffield.....	1 Hoff. 110.....	165
Wilkes v. Davis.....	3 Mer. 507	167
Williams v. Halliard	11 Stew. Eq. 373	192
Williams v. Williams.....	1 Hagg. 299	151
Williamson v. N. J. S. R. Co.....	10 C. E. Gr. 13.....	523
Williamson's Case.....	26 Pa. St. 9.....	180
Willson v. Black Bird Co.....	2 Pet. 245.....	417, 446
Witherspoon's Case.....	3 Rich. Eq. 13.....	494
Wood v. Stover.....	1 Stew. Eq. 248.....	120
Woodbury Assn. v. Charter Oak Ins. Co.	31 Conn. 517.....	75
Woodruff v. Clark.....	13 Vr. 198.....	213
Woodward v. Earl Lincoln.....	3 Swanst. 626.....	180

Y.

Yosemite Valley Case.....	15 Wall. 77.....	420
Young v. Rathbone.....	1 C. E. Gr. 224	546
Young v. Young.....	5 Stew. Eq. 275.....	232

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1884.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET AND JOHN T. BIRD, ESQS.,
VICE-CHANCELLORS.

In the matter of the application of CHARLES H. MING, collector
of taxes, for an order directing that certain taxes be paid.

A statute directing that taxes assessed upon property held in trust or for
life &c., should be assessed in the name of the person entitled to the beneficial
interest or income thereof, does not authorize an assessment against "the
chancellor in trust," in respect to a mortgage given to the chancellor, the
interest whereon is payable for life to one who is still living, and the princi-
pal thereof, after her death, payable to the chancellor.

Messrs. Neighbour & Smith, for petitioner.

THE CHANCELLOR.

The petition states that in 1879, 1880, 1881 and 1882, re-
spectively, an assessment was made in Chester township, Morris

Ming's Case.

county, upon the chancellor "as chancellor in trust," upon personal property of the value of \$7,000; that it was made in respect of a mortgage for \$7,000 and interest, given by William Childs and wife, in 1868, to the chancellor, the interest whereon was payable to Phoebe Bartles for life (she is still living), and the principal, at her death, to the chancellor; and that Frederick Childs, of that township, was and is the owner of the mortgaged premises, and in each of those years claimed and obtained a deduction from the valuation of his taxable property in respect of the principal of that mortgage. The petition further states that he refuses to pay the taxes so assessed against the chancellor in respect to the mortgage, and it prays that an order may be made directing him to retain and pay them out of the interest-money which will become due on the mortgage on the 1st of April next.

It will have been seen that all of the assessments in question were made against the chancellor as "chancellor in trust," and not to Mrs. Bartles. Before the act of 1879, the money secured by that mortgage was not taxable at all. *Trustees &c. v. Trenton, 3 Stew. Eq. 667*. By that act it was provided that the taxes assessed on entailed property, or property held in trust or for life, should be paid out of income from such property, or by the person or persons having the beneficial interest at the time; but that in case the taxes so assessed should be upon real estate, and the person or persons holding such real estate in trust or having a beneficial interest therein should fail to pay the taxes, the taxes assessed or laid thereon should be a lien on such real estate. *P. L. of 1879 p. 54*. That act did not authorize the assessment of the tax upon the chancellor for or in respect to this mortgage. By the act of 1882 (*P. L. of 1882 p. 120*) provision was made for assessing tax in respect to such mortgages, but it expressly provided (section 3) that the assessment should be made to the person or persons having the beneficial interest in them, or who might be entitled to have the income or interest thereof at the time of the assessment, whether such person or persons reside in this state or not. It provided also (section 6) for the collection of taxes assessed under the act of 1879, such collection to be by

Cary v. Cary.

the ordinary methods or by order of this court for the payment of the taxes out of the income or interest of the mortgage on petition of the collector of taxes. That act does not authorize, nor does it recognize as valid, any assessment against the chancellor; but it distinctly provides that the assessment shall be made against the person or persons having the beneficial interest in the mortgage, or who may be entitled to the interest. And in providing for the collection of taxes assessed in respect to such mortgages, under the act of 1879, it refers to assessments made against such persons only. The assessments in question, therefore, were wholly unauthorized, and inasmuch as they are not within the provisions of either of the acts above mentioned, they will not warrant the making of the order prayed for. The petition, therefore, must be dismissed.

ANNA V. CARY

v.

GEORGE CARY.

A defendant arrested, and in custody under a *ne exeat*, may, before answer, apply for the discharge of the writ on affidavits.

Bill for divorce. On motion for rehearing.*Mr. B. C. Frost*, for the motion.*Mr. J. F. Dumont*, contra.

THE CHANCELLOR.

This is an application for the rehearing of an order advised by a vice-chancellor, refusing to entertain a motion by the defendant to discharge a *ne exeat* issued against him, and under

Cary v. Cary.

which he was, and still is, in custody. The defendant has not answered the bill. His application is founded on affidavits. The ground of the refusal to entertain the motion was that, the writ having been served, the defendant could not be discharged on affidavit, but must answer. *MacDonough v. Gaynor*, 3 C. E. Gr. 249, is cited as authority. Chancellor Zabriskie there, indeed, laid it down as one of the settled rules of practice in courts of equity, as to the writ of *ne exeat*, that if the writ is served, no subpoena is necessary, and the party cannot be discharged upon affidavit, but must make answer. He cites *Russell v. Asby*, 5 Ves. 98. It is quite obvious that such a rule, if it existed, might produce great hardship to defendants subjected to restraint under the writ unjustly obtained. Said Lord Eldon, in *Hannay v. McEntire*, 11 Ves. 54, "It [the writ] is a most dreadful weapon by which a malicious man may expose another, who has no intention of doing wrong, to great vexation." A rule which would deny to the defendant the privilege, not to say right, of appealing to the court to discharge the writ until after he shall have answered the bill, would, in some cases, put it out of his

NOTE.—A discharge was refused, where the defendant denied, by affidavit, his intention to go abroad, *Amsinck v. Barklay*, 8 Ves. 594; *Whitehouse v. Partridge*, 3 Swanst. 375; *McGauran v. Furnell*, Sau. & Sc. 263; *Houseworth v. Hendrickson*, 12 C. E. Gr. 60; *Glenton v. Clover*, 10 Abb. Pr. 422; see *Conyers v. Gray*, 67 Ga. 329.

A defendant may be discharged before answer, on motion founded on his own affidavits only, *Sichel v. Raphael*, 4 L. T. (N. S.) 114; *Cowdin v. Cram*, 3 Edw. Ch. 231.

The motion to discharge may be made on the answer, without defendant's affidavit, *Fitch v. Richardson*, *Morris* (Iowa) 245; see *Hughes v. Ryan*, *Beatty* 327.

In general, a defendant may, after arrest, show that the writ ought not to have been granted, *McGee v. McGee*, 8 Ga. 295; *West v. Walker*, 6 Blackf. 420; see *Breck v. Smith*, 54 Barb. 212.

A petition for a *ne exeat* is amendable, *Bassett v. Bratton*, 86 Ill. 152; or a bill, *Fisher v. Stone*, 3 Scam. 68; and also the writ itself, *Viadero v. Viadero*, 7 Hun 313.

A petitioner for a *ne exeat* may be held liable for false imprisonment by a defendant who has been illegally arrested thereunder, *Lees v. Paterson*, L. R. (7 Ch. Div.) 866; *Bassett v. Bratton*, 86 Ill. 152; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Ammerman v. Crosby*, 26 Ind. 451.—REF.

Cary v. Cary.

power to seek relief for a long period of time, and so give to the complainant a great and unjust advantage, and ought not to exist. But such is not the rule. Lord-Chancellor Rosslyn did, indeed, so hold, in *Russell v. Asby* (1799), and in *2 Mad. Ch. Pr. 230*. On the authority of that case, it is said that the defendant, having appeared, must put in his answer, and may then apply to set aside the writ ; but, in *Hyde v. Whitfield*, *19 Ves. 342* (1815), Lord Eldon entertained a motion to discharge a *ne exeat* on the defendant's affidavit. In *Flack v. Holm*, *1 Jac. & W. 414* (1820), the same chancellor held that the court might ascertain from the affidavits—which, in that case, were put in on both sides—whether the writ was properly granted or not ; and in *Grant v. Grant*, *3 Russ. 598* (1827), on a preliminary objection founded on the above-mentioned ruling in *Russell v. Asby*, he held that a defendant who was in custody upon a *ne exeat* might, at any time, apply to discharge the writ, on affidavits showing that it had issued improperly. In *Newland's Ch. Pr. 238*, it is laid down that the writ may be discharged by the defendant on his satisfying the court, by his answer or affidavit, that he has no intention of leaving the kingdom, or that he is not indebted to the plaintiff. In *Smith's Ch. Pr. 551*, it is said that a defendant in custody under a *ne exeat* is not bound to answer before he moves to discharge the writ. In *Hoffman's Ch. Pr. 361-363*, it is laid down that when the defendant has given the prescribed security, or is in the custody of the sheriff, he may move to discharge the *ne exeat*, giving the usual notice of a special motion, and that the motion may be made upon a want of equity appearing upon the bill itself, or the insufficiency of the affidavit or allegation as to the party's going abroad, upon the defendant's answer or upon affidavits. The writer adds that everything which shows that the writ ought not to have been granted, is a reason to discharge it, and that affidavits may be read both in support of and against the motion to discharge the writ. See, also, *2 Dan. Ch. Pr. 1712*. In this court, in *Parker v. Parker*, *1 Beas. 105* (Chancellor Williamson), the defendant was permitted, before answer, to question, on affidavits, the propriety of granting the writ. See, also, *Kirrigan v. Kirrigan*, *2 McCart. 146*

Van Duyne v. Shann.

(Chancellor Green). In the case in hand, the vice-chancellor declined, as before stated, to hear the application because the defendant had not answered. This was erroneous.

CORNELIUS VAN DUYNÉ

v.

MATTIE C. SHANN et al.

A mortgage of \$1,000 was foreclosed, but through the mistake of the complainant's solicitor a subsequent judgment creditor was not made a party. By an agreement between the owner of the equity of redemption (which was subject to the charge of a life estate and legacies amounting to \$1,750, all of which were paramount to the judgment) and the mortgagee, the latter purchased the premises at the foreclosure sale and transferred his bid to the owner of the equity of redemption, and at the same time advanced to him another \$1,000, for which he received a mortgage of \$2,000, including his old mortgage, on the same premises. The owner of the life estate and the legatees released their respective interests in the premises, taking therefor mortgages subsequent to complainant's \$2,000 mortgage. The additional \$1,000 was expended in paying off the principal and interest of encumbrances prior to the \$1,000 mortgage, and taxes on the premises then due.—*Held*, that the judgment did not, through the solicitor's mistake in omitting it from the foreclosure, become a lien on the premises prior to the \$1,000, but the latter must still be treated as an existing encumbrance, and the complainant entitled to an account of the moneys due to him thereon, and of all moneys paid by him or any subsequent grantee for taxes and necessary repairs on the premises, as well as for the liquidation of any encumbrances thereon prior in lien to the judgment; and, on the other hand, complainant must account for all rents and profits received by his grantee or those claiming under him since the delivery of the sheriff's deed under the foreclosure of the \$1,000 mortgage.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. G. O. Vanderbilt and *Mr. J. H. Stewart*, for complainant.

Messrs. J. W. & J. K. Field, for George Ward.

Van Duyne v. Shann.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage given by John Fenning and wife, June 13th, 1856, to Anthony Simmons, on a lot of land (with a house upon it) in Princeton for \$500 and interest, now held by the complainant, and a mortgage given to the complainant by Charles J. Fenning and wife, April 7th, 1871, on the same premises, to secure the payment of \$2,000, besides interest. The lot is of the dimensions of sixty feet front and rear, by one hundred and twenty in depth, but by mistake is described in the first-mentioned mortgage as being one hundred and ninety feet deep. The bill prays that the description in that mortgage may be rectified in that respect. It appears that John Fenning, who continued to own the property after the complainant's first mortgage was given, up to the time of his death, gave, August 1st, 1865, another mortgage upon it to Abraham Johnson for \$500 and interest, which mortgage was assigned on December 3d, 1872, to Robert D. Warren. John Fenning died December 31st, 1866. By his will he devised all his real property to his wife for life, with remainder in fee to his son John A., and charged it with legacies amounting to \$1,750, to his children James, Frederick, George, Teresa and Mary, payable at the death of his wife or within a year thereafter. On May 26th, 1868, John A. Fenning, the son, gave a mortgage on the lot to the complainant for \$1,000 and interest. On the same day James Palmer & Sons recovered a judgment against him in Mercer circuit court for \$250; August 22d, 1868, Imlah and Charles Moore recovered a judgment against him and John Cruser in the supreme court of this state for \$813.12; November 4th, 1868, Josiah H. Cain and George Ward (J. H. Cain & Co.) recovered a judgment (now owned by Ward, who has survived Cain) against him in the last-mentioned court for \$669.99; December 2d, 1868, Theodore F. Johnson & Co. recovered a judgment against him and Benjamin R. Thomas (surety) in the Mercer circuit court for \$504; October 9th, 1869, John A. Fenning and wife conveyed the mortgaged premises to his brother, Charles J. Fenning, subject to the legacies charged thereon and subject to their mother's life estate; December 8th,

Van Duyne v. Shann.

1869 (after he had parted with the property), he, John, gave a mortgage on the same premises to John Cruser for \$1,000.

The complainant, March 10th, 1870, filed his bill in this court to foreclose his \$1000 mortgage. He made John Cruser (as mortgagee), Charles J. Fenning and Benjamin R. Thomas, as judgment creditor (he was then the holder of the before-mentioned judgment recovered by Theodore F. Johnson & Co. against John A. Fenning and himself), defendants. The judgments in favor of James Palmer & Sons and Imlah and Charles Moore had been paid. Those persons, therefore, were not made defendants. The judgment in favor of Cain and Ward was not paid. The plaintiffs therein were not made parties merely because the solicitor by whom the bill was drawn and the proceedings conducted, was not aware of the existence of the judgment. He relied on a statement made by John A. Fenning as to what judgments were liens on the property, and in that statement that judgment was not mentioned. There were a final decree and execution for the sale of the mortgaged premises in the case, and under them the property was sold March 31st, 1871, to raise for the complainant \$1,183.75; for Thomas \$256.41, and for Cruser \$1,146.42.

At the sale under the execution, the property was struck off to the complainant for \$100, but the deed, which was given April 7th, 1871, was made to Charles J. Fenning, by direction of the complainant. This appears to have been done in pursuance of an arrangement between the complainant and Charles J. Fenning, by which the former agreed to let the latter take the title to the land and to lend him \$2,000 on mortgage thereof, provided he would get a release of the life estate of his mother in the property and a postponement of the legacies charged on the land to the lien of mortgage, and would apply the \$2,000 to the payment of the sheriff's fees on the execution, the taxed costs of suit, the interest due on the complainant's \$1,000 mortgage, and the payment of a mortgage on the property, given prior to any of those above mentioned, in 1840, by John J. Fenning (the above-mentioned John Fenning) to David Hullfish, for \$200, and interest, and assigned to Job Olden, and the interest due on

Van Duyne v. Shann.

the complainant's first mortgage, called the Johnson mortgage, and the interest due on the mortgage held by Duryee, and also the taxes which were in arrear on the premises. The arrangement is stated in a memorandum made, after the sheriff's sale and on the same day, by the complainant's solicitor in the foreclosure suit, as follows :

"Van Duyne is to take a new mortgage on the whole property, for his claim, decree, with interest and costs, and as much more as will make \$2,000, to follow the two mortgages of Duryee and Johnson; amount, together, \$1,000. The interest on said mortgages and Job Olden's mortgage, for principal and interest and taxes, are to be paid out of the surplus of said \$2,000, after Van Duyne's claim shall be satisfied, and the widow and legatees of John Fenning, deceased, are to execute releases of their interest in said property; deed from sheriff to be made to Van Duyne or to whom he may direct."

The arrangement was carried out strictly. The widow and legatees released their claims to and upon the property, and the \$2,000 mortgage was given, and the money advanced on it, according to the agreement. The widow took, for her life estate, a subsequent mortgage on the property, to secure an annuity to her, and the legatees took, in consideration of their release, a trust mortgage, also subsequent to the \$2,000 mortgage. Charles J. Fenning paid on the Johnson mortgage, \$175; on the Duryee mortgage, \$100, and on the Olden mortgage (in full), \$224; and he paid about \$200 of taxes. The complainant retained, out of the \$2,000, the principal and the interest (\$202.76) due on his \$1,000 mortgage, and the costs of the foreclosure and interest thereon (\$71.03), and the sheriff's execution fees (\$26.83). These sums, altogether, amount to \$1,999.62. George Ward, owner, as before mentioned, of the judgment recovered by J. H. Cain & Co., insists that that judgment is a lien on the property next after the Johnson and Duryee mortgages. The complainant, on the other hand, claims priority for both of his mortgages, over the judgment. The bill states that the \$1,000 mortgage held by the complainant was never canceled of record. All the money lent on the \$2,000 mortgage was, with the exception of what was paid for costs and execution fees, used—and it was lent on condition that it should be so used—in the payment or reduction of the amount of liens upon the

Van Duyne v. Shann.

mortgaged premises, which were prior to the judgment. That money was lent on the security of that mortgage, in good faith, and in the conviction, on the part of the complainant and of the borrower, also, that, after the foreclosure sale, there was no claim upon the property except the Olden, Johnson and Duryee mortgages, the life estate of the widow, the charges of the legacies and the taxes. The inducement to the complainant to lend the money on the security of the mortgage, was the release of the life estate and the postponement of the charge of the legacies to the lien of the mortgage, and the payment of the interest on the Johnson and Duryee mortgages, and the payment of the Olden mortgage, with the taxes and the costs of the foreclosure and the execution fees. The foreclosure proceedings were *bona fide*. The object, indeed, was to bring the property to a public sale under them, for the payment of the encumbrances upon it subsequent to and including the complainant's \$1,000 mortgage, in order that it might be cleared of them. That was a legitimate purpose, and it was carried out fairly. The sale, of course, did not and could not affect J. H. Cain & Co.'s judgment. The omission to make anyone a party in respect to it was, as before stated, not from design, but by mere oversight of the complainant's solicitor. The sale was an open and public one, conducted fairly and according to law, and in the usual way. The property, clearly, was not worth the amount of the encumbrances upon it prior to the Ward judgment. It sold, in fact, for \$100, subject to the encumbrances prior to the complainant's \$1,000 mortgage. The foreclosure was complete as to all encumbrances subsequent to and including that \$1,000 mortgage, except J. H. Cain & Co. In the conviction that the title acquired under it was complete against all those subsequent encumbrances, the complainant advanced \$2,000 on mortgage of the property, on condition that the life estate should be extinguished, the charge of the legacies postponed to that mortgage, and the money, over and above what was due on his \$1,000 mortgage, with costs of suit and execution fees, paid in discharge or reduction of prior encumbrances. And that condition was, as before stated, in all respects fully performed. The question is whether, under the

Van Duyne v. Shann.

circumstances, Ward should have the benefit of that release and postponement and payment of paramount encumbrances. It is too obvious for remark that it would be contrary to the dictates of justice to give him that advantage, and it would be surprising to find that any rule of equity (using the term in its technical sense) would prevent this court from doing between the parties what justice demands, and constrain it to do injustice. Were this a suit to compel Ward to redeem, he would, under the circumstances, be required to pay the amount of all encumbrances prior to his, to pay which the property was sold. That is, he would be required to pay the complainant's \$1,000 mortgage and interest, but not the costs of suit, or of the execution. *Parker v. Child*, 10 C. E. Gr. 41; *Benedict v. Gilman*, 4 Paige 58; *Jones on Mort.* § 1075; *McCormick v. Knox*, 105 U. S. 122; *Chilver v. Weston*, 12 C. E. Gr. 435. Also all moneys which the purchaser had paid in reduction or discharge of prior encumbrances. *McCormick v. Knox*, *ubi sup.* Or for interest thereon. Or for taxes or municipal assessments. *Atwater v. West*, 1 Stew. Eq. 361; *Dale v. McEers*, 2 Cow. 118; *McCormick v. Knox*, *ubi sup.* In *Benedict v. Gilman*, above cited, Chancellor Walworth held that a judgment creditor, in order to redeem property sold under a statute foreclosure, must pay for valuable permanent improvements put by the purchaser on the premises, under the belief that he had acquired a good title and in ignorance of the existence of the judgment. "It is charged in the bill in this case," he says, "and admitted by the answer, that at the time of the statute foreclosure the whole value of the premises did not exceed the amount due on the mortgages and costs of the proceedings, and that the complainant was ignorant of the existence of these judgments [which were liens on the land] until after he had made permanent improvements upon the premises to a considerable extent. Under such circumstances it would be inequitable and unjust to give the defendants [the judgment creditors] the benefit of those improvements without compelling them to pay an equivalent therefor. The case would have been different if the complainant had made the improvements with a full knowledge of the defendants' equitable right to redeem."

Van Duyne v. Shann.

He would have to pay for necessary repairs. *Godfrey v. Watson*, 3 *Atk.* 517; *Vanderkemp v. Shelton*, 11 *Paige* 28. On the other hand, he would be entitled to an account of the rents and profits, and to have them applied to the payment of those moneys.

It must be stated, to complete the history of the title, that the property was conveyed by Charles J. Fenning and his wife to John F. Shann, January 8th, 1872, and Shann and his wife conveyed it to Margaret Wyckoff, April 17th, 1872, and she and her husband conveyed it to Mrs. Shann, June 5th, 1872, and she now owns it. Shann and his wife mortgaged the property March 19th, 1872, to Henry D. Johnson, for \$500 and interest. Johnson assigned the mortgage to Henry B. Duryee. Shann and his wife, in April, 1872, mortgaged the property to Henry B. Duryee for \$200 and interest.

The complainant is entitled to an account of the moneys due him for principal and interest on his \$1,000 mortgage, which is to be treated as an existing encumbrance, and of all moneys paid for taxes, whether paid by him or Charles J. Fenning or his grantees, and for all necessary repairs put on the property by Fenning or his grantees, and of all principal and interest paid by Fenning or his grantees on the prior encumbrances since the sale. On the other hand, he is to account for all rents and profits received by Charles J. Fenning or his grantees since the delivery of the sheriff's deed to the former. Should the accounting result in a balance against him it must be credited on his first mortgage. If in his favor he is to have a decree for the amount of the balance prior to the Ward judgment claim. He is entitled to his costs of this suit.

He is not entitled to subrogation to the rights of the legatees under the will of John Fenning. He has not paid their claim nor any part of it. They agreed with him that if he would lend the \$2,000 to Charles J. Fenning on mortgage of the property, they would postpone their claim to the mortgage. And so, too, of the widow's life estate. She on like consideration agreed to release it and take a subsequent mortgage for an annuity instead of it. The complainant is entitled to no exemption from accounting for the rents and profits by reason or

Davis v. Davis.

in consideration of those matters. The claims of the trustee under the mortgage given to secure the legacies, to priority over the Ward judgment, cannot be allowed. The legatees must be regarded as having voluntarily relinquished their preference.

The error in the complainant's first mortgage will be corrected. The depth of the lot is only one hundred and twenty feet, and not one hundred and ninety as stated in that instrument.

SMITH DAVIS, executor &c.,

v.

JOHN DAVIS et al.

Under this clause in a will, "I give and devise unto the lawful heirs of David Davis, \$500, to be paid to them by my executor when they shall arrive at the age of twenty-one years," David Davis being the son of the testator and having, when the will was executed, three children, and when testator died, *four*, all of whom are now living, and two minors—*Held*, (1) That this gift was to the children of David Davis, as a class, and that each child who was living at testator's death took a vested interest; (2) that each child is entitled to payment of its portion of the \$500, on attaining majority, but not to interest thereon from the time of testator's death, because, as grandfather, he did not stand *in loco parentis*; (3) that the legal construction of the word "heirs," in this clause, is not controlled or affected by another clause in the will, making a bequest to the "children" of testator's daughter.

Bill for construction of will. On final hearing on pleadings and proofs.

Mr. W. E. Potter, for complainant.

Mr. J. S. Mitchell, for defendants.

THE CHANCELLOR.

Joel Davis, late of Millville, died in May, 1868. By his

Davis v. Davis.

will, which is dated February 6th, 1866, he made, among other devises and bequests, the following :

“I give and devise unto the lawful heirs of David Davis, \$500, to be paid to them by my executor when they shall arrive at the age of twenty-one years.”

David Davis was his son. The executor brings this suit to obtain a construction of that bequest. He settled the estate in the orphans court, in 1869. It proved insufficient to pay all the legacies in full, and he has paid the percentage (eighty-two and fifty-two hundredths) to all the legatees, except those mentioned in the above-quoted bequest, and obtained their release. Since he paid that percentage, he has collected \$62.18 for the estate, on a suspended claim. At the date of the will, David Davis had three children, but, before the testator's death, another was born to him. They are all still living. The oldest was, at the filing of the bill, twenty-eight years old ; the next, twenty-one ; the third, eighteen ; and the fourth, sixteen.

By the term “lawful heirs,” the testator meant legitimate children. That he did not use the word “heirs” in its technical sense, is evident from the fact that he directs that payment be made to the legatees, by his executor, when they arrive at the age of twenty-one years. He therefore referred to certain persons, all of whom were under age. He uses the word “heirs” to signify children, in a previous section, in which he gives property, both real and personal, to his daughter Ruth, “and to her heirs after her.” David Davis was living when the will was made and also when the testator died. Speaking technically, he had no heirs, for a living man has none ; but, according to the common use of the term, his children were his heirs, though he was still alive. The gift to the designated persons was immediate and vested on the death of the testator. He therefore referred to persons who, at his own death, would be “heirs” of his son David, who was living when the will was made, as he still is. He could not have meant persons who would, technically speaking, be the heirs of David, but must have meant heirs apparent, or children. The construction to be put upon the word “heirs,”

Davis v. Davis.

in such cases, is generally a mere question of intention. The cases in which the courts, in expounding wills, have construed the term as meaning children, are so numerous that a reference to them is unnecessary.

It is suggested that the fact that the testator, in the section next preceding that under consideration, in making a bequest to the children of one of his daughters, used the term "children" for the purpose, is an argument against construing the word "heirs" to mean children, inasmuch as it might be supposed that, in using different terms, he meant to designate different persons in the two cases. But, in the early case of *Loveday v. Hopkins*, 1 Amb. 273, that very consideration was regarded as a strong argument the other way. There, the testatrix gave to her sister Tooke's heirs, £1,000; to her sister Loveday's heirs, £6,000, and to her sister Brady's children, £1,000. The master of the rolls, Sir Thomas Clarke, was clearly of opinion that she intended to give the £6,000 to the children of Mrs. Loveday, as, in the subsequent clause, she intended to give £1,000 to Brady's children. In many of the cases, the testator recognized, in the context, by a gift to the person to whose heirs the gift was made, or in some other way, the existence of such person when the will was made. Here, he merely refers to the person as David Davis. But David Davis was his son, and he does not speak of him as a deceased person. He knew he was alive.

As before stated, the gift, which is to a class, was immediate, and vested on the death of the testator. Those who are to take under it are ascertained by reference to the time of the testator's death. Those who were the members of the class then, and not those only who were members of it when the will was made, are entitled to take. *Theob. on Wills* 142. Therefore, all of the children of David Davis are entitled to share in the gift, for they were all *in esse* when the testator died. And those of them who have attained their majority were entitled to payment as they reached the age of twenty-one years. And they are entitled to interest from, but only from, that time. The others will be entitled to payment as they respectively attain to their majority. The legatees are entitled to interest only from the time

Smock v. Jones.

their legacies are payable. There is no legal ground for the claim that the legatees are entitled to interest before that time, for their maintenance. The testator, who was their grandfather, did not stand *in loco parentis* to them.

The executor and the answering defendants are entitled to costs and a reasonable counsel fee, in this suit. The money which was collected on the suspended claim since the executor settled his account, will be applied to that purpose, as will, also, so much of the interest collected on the legacy in question as may be necessary.

ISAAC G. SMOCK

v.

SAMUEL W. JONES et al.

To a bill to foreclose a first mortgage, the holders of the second and third mortgages on the premises were made defendants; also the wife of the mortgagor, who held the fourth mortgage thereon, and also the assignee for the benefit of creditors under an assignment by the mortgagor. The answers of the second and third mortgagees set up fraud in the consideration of the fourth mortgage, but before this matter had been fully inquired into, all the parties entered into a written agreement that the premises should be sold, saving all questions of priority &c. The second and third mortgagees had no interest in the validity of the fourth mortgage, and had set up their objection thereto by answer instead of by cross-bill, as the practice then required. The assignee for the benefit of the mortgagor's creditors having been misled by those answers and by his expectation that the *bona fides* of the fourth mortgage could be investigated thereunder, was afterwards allowed to file an answer in the nature of a cross-bill, attacking the fourth mortgage for fraud therein.

On bill to foreclose. Motion for leave to amend answer and file a cross-bill, if necessary. On order to show cause and affidavits on both sides.

Mr. R. Allen, Jr., for the motion.

Mr. W. H. Vredenburg, contra.

Smock v. Jones.

THE CHANCELLOR.

The bill in this cause was filed April 10th, 1879, to foreclose a mortgage on the farm of the defendant Samuel W. Jones, in Monmouth county. Mary Willetts, who held a mortgage on part of the farm, the board of chosen freeholders of the county of Monmouth, which held a mortgage on another part, and Letty A. Jones, wife of the mortgagor, who held a subsequent mortgage on the whole of the property, were, with the mortgagor, her husband, and Chilion Robbins, his assignee under an assignment for the equal benefit of his creditors, made parties. Mrs. Jones was made a party both in respect of her right of dower in the premises and her mortgage. Answers were put in by the holders of each of the mortgages and also by the assignee. Those of Mary Willetts and the board of chosen freeholders were put in June 24th, 1879, that of Mrs. Jones, September 12th, 1879, and the answer of the assignee on the 10th of October following. The answers of Mary Willetts and the board of chosen freeholders, besides setting up their respective mortgages, both of which were prior to that of Mrs. Jones, attacked the latter on the ground that it was without consideration and made to defraud Jones's creditors. Jones gave the mortgage held by his wife to his son, who assigned it to her May 6th, 1879. He made his assignment the next day. By her answer Mrs. Jones claimed that all the money secured by her mortgage was due to her thereon. The assignee, by his answer, so far as her mortgage was concerned, admitted the making of it, but asked that there might be a reference to ascertain the amount due thereon. The cause was referred to one of the advisory masters, and it appears that some testimony was taken before him in relation to the *bona fides* of that mortgage, but before the testimony was declared closed the mortgagees and the assignee, in view of the fact that it was very desirable that a sale of the property should be had in the Spring, agreed to a sale of it under the complainant's mortgage, the validity and priority of which were admitted. The agreement was in writing and was made December 27th, 1879. It contained the following provision :

Smock v. Jones.

“Saving and reserving all questions as to the priorities of the several mortgages thereon, as to the payment of the moneys to the several parties interested therein, and whether the same [the property] should be sold together or in parcels.”

A decree was accordingly entered February 1st, 1880, directing that the property be sold. The premises were sold under the execution March 10th, 1880. Jones's brother attended the sale at the request of Mrs. Jones, and bid for the property, but was not the highest bidder. It was struck off to Henry S. Little at \$13,350 or thereabouts, and he subsequently sold and conveyed it to Mrs. Jones at an advance of \$1,000 over the price at which he bought it. Out of the proceeds of the execution sale the amounts due to the complainant, Mary Willetts and the board of chosen freeholders, respectively, were paid, and the rest of the money, \$1,468.88, was paid into this court. From that time until the filing of the cross-bill hereafter to be mentioned, no step was taken in the cause. Early in 1881 the assignee filed his cross-bill to set aside Mrs. Jones's mortgage on the ground of fraud. It was filed without leave. She demurred to it, and the demurrer was sustained. The order sustaining the demurrer was entered November 9th, 1883. On November 20th, 1883, Mrs. Jones filed her petition in the cause for the payment of the money in court to her on account of her mortgage. No adjudication was made upon it. On December 11th, 1883, an order was obtained by the assignee, on affidavits, requiring her to show cause why he should not have leave to amend his answer by setting up the defence of fraud against her mortgage, and to file a cross-bill against her, if necessary, to set aside the mortgage on that ground. The assignee was not aware of the existence of the objection to the mortgage in question when he put in his answer. About the time when the agreement to sell was made, he first learned of it, and then ascertained also that the matter was in the course of litigation before the advisory master under the answers of Mary Willetts and the board of chosen freeholders, and he understood and believed, he says, that the question of the *bona fides* of the mortgage, and whether anything was due upon it, would be tried and adjudicated upon under those answers. He also says that

Smock v. Jones.

he intended to bring those matters to trial under the pleadings as they then were, or if not appropriate, then under others to be filed by himself for the purpose, but awaited the result of the sale, desiring to ascertain whether there would be any surplus after paying the other mortgages before incurring any expense in the matter. There is no reason to doubt that he in good faith intended to test the validity of the mortgage. The proceedings were in fact not apt for the purpose. The defence to the mortgage was set up by two prior mortgagees, and it was set up in their answers only and not by cross-bill, as the practice then required. Nor could they have obtained leave to file a cross-bill had they applied for it, because being prior mortgagees they had no interest in the question of the validity of that mortgage.

It is urged in opposition to this motion that the agreement before referred to was an abandonment, not only of all litigation of the question, but of all intention to litigate it. But the evidence does not sustain this claim. Apart from what the counsel of the complainant and the counsel of Mary Willetts and of the board of chosen freeholders and the assignee himself swear was their understanding of the agreement, the instrument itself is evidence that there was no intention to do anything more than effect a sale of the property and transfer the litigation from the land to the proceeds of the sale. The agreement expressly reserves all questions as to the priorities of the several mortgages (all of them), and as to the payment of the moneys to the several parties interested therein, and also as to whether the premises should be sold as a whole or in parcels. Clearly, there is no evidence of an intention to abandon any defence, but directly the contrary.

It is also urged that justice to Mrs. Jones requires that the assignee be not permitted to question the validity of her mortgage now, because, believing that all such question was put at an end by the agreement for sale, she procured her brother-in-law to attend the sale and bid upon the property. There is no weight in that objection.

It is also urged that the application comes too late—that the motion for leave to file a cross-bill should have been made at the

Cary v. Cary.

time of putting in the answer. But as already stated, the assignee swears that he did not know of the defence when he filed his answer, and therefore did not set it up. This application differs essentially and radically from the application of a defendant to amend his answer so far as the complainant's claim to relief against him is concerned, and most of the rules which govern in such cases are not applicable to this. This is not an application of a defendant to change or add to his defence to the complainant's suit against him, but is a request by a defendant in a suit *in rem* for leave to put in a defence against the claim of a co-defendant. Obviously, leave should be readily given in such a case, unless there be special circumstances to forbid. There is nothing in the conduct of the assignee to induce the court to deny him the desired opportunity. It is not alleged that Mrs. Jones will be prejudiced in any way by the delay which has taken place, and a satisfactory excuse is given for it. The leave will be granted. Under the present practice a cross-bill will not be necessary. The defence may be set up by way of cross-bill in the answer, which may be amended accordingly. The assignee, however, should pay Mrs. Jones her costs of this application.

ANNA V. CARY

v.

GEORGE CARY.

Statements by a defendant who was subsequently arrested on a *ne exeat*, made to complainant's lawyer, that if suits should be begun against him, and he should be likely to get the worst of it, or if any order should be made against him by any court, his (defendant's) lawyer would find it out beforehand and would let him know, so that he could and would leave the state before they could do anything with him, accompanied by other statements, that complainant and her father were both poor, and that he would law them both to death if they attempted any suits against him, and that he had put all his property out of his hands, but still had the benefit of it, are sufficient, on an application for his discharge, to hold him in custody under the *ne exeat*.

Cary v. Cary.

Bill for divorce *a mensa et thoro* and alimony. Motion to discharge *ne exeat*.

Mr. B. C. Frost, for the motion.

Mr. J. F. Dumont, *contra*.

THE CHANCELLOR.

This is an application to discharge the defendant from the custody in which he is held under a writ of *ne exeat* issued in this cause, or, failing that, to reduce the amount of the bail. Bail was ordered in the sum of \$1,000. The defendant denies with great particularity and positiveness the charges of cruelty made against him in the bill, and while to a certain extent he is corroborated by his witnesses, the evidence on the other side in support of those charges is overwhelmingly against him.

As to the grounds for the *ne exeat*: While he swears that he never said what is imputed to him in the complainant's affidavit annexed to the bill, and on which the writ was granted, it is proved that he said to the complainant's lawyer before the suit was begun, referring to her complaints against him and her application to the lawyer to take legal proceedings for her relief, that if law-suits should be commenced against him, and he should be likely to get the worst of it, or if any order should

NOTE.—For illustrations of what threats to go abroad, are sufficient ground to issue a *ne exeat*, see *Smithson's Case*, 2 Vent. 345; *Shearman v. Shearman*, 3 Bro. C. C. 370; *Oldham v. Oldham*, 7 Ves. 410; *Etches v. Lance*, 7 Ves. 417; *Jones v. Alephsin*, 16 Ves. 470; *Whitehouse v. Partridge*, 3 Swanst. 374; *Boehm v. Wood, Turn. & R.* 342; *Collinson v. Collinson*, 18 Ves. 352; *Darley v. Nicholson*, 1 Dr. & War. 66; *Baker v. Rowan*, 2 Stew. & P. 361; *Fitzgerald v. Gray*, 59 Ind. 254; *Lyon v. Lyon*, 21 Conn. 199, note; *McGee v. McGee*, 8 Ga. 295; *Bryan v. Ponder*, 23 Ga. 480; *Orme v. McPherson*, 36 Ga. 571; *Malcolm v. Andrews*, 68 Ill. 100; *Jones v. Kennicott*, 83 Ill. 484; *Baily v. Baily*, 2 Md. Ch. 326; *Yule v. Yule*, 2 Stock 133; *Anshutz v. Anshutz*, 1 C. E. Gr. 162; *Denton v. Denton*, 1 Johns. Ch. 364; *Bushnell v. Bushnell*, 15 Barb. 399; *Forrest v. Forrest*, 10 Barb. 46; *Mattocks v. Tremain*, 3 Johns. Ch. 75; *Dunham v. Jackson*, 1 Paige 629; *Drausfield v. Drausfield*, 6 Phila. 143; *Smith v. Koontz*, 4 Hayw. 189; *Lehman v. Logan*, 7 Ired. Eq. 296; *Dean v. Smith*, 23 Wis. 483; *Ramsay v. Joyce*, 1 McMull. Eq. 247, 253.—REP.

Kirkpatrick v. Corning.

be made against him by any court, his lawyer would find it out beforehand and would let him know, and then he could and would go out of the state before they could do anything with him, and that they would find that he was a good deal too smart for any of them. The same witness testifies that the defendant said to him that the complainant and her father were both poor, and that he would law them both to death if they attempted any suits against him; that he was ready for them; that he had some time before that put his property out of his hands to prevent his wife from getting any of it, but that he yet had the benefit of it when he wanted it, and that he had credit to the amount of \$3,000 that he could use. The witness adds that the defendant then drew from his pocket and showed him a roll of bills, about a dozen, and exhibited one of them so that he might see that it was of the denomination of \$100, and remarked that they could not hurt him so long as he had plenty of those, and added that he had and could raise more like that if necessary, and that they could carry him through. There is no ground for granting the motion to discharge him from custody, nor is there any reason for reducing the amount of the bail. The motion is denied, with costs.

ANDREW KIRKPATRICK, receiver &c.,

v.

ERASTUS CORNING et al.

On a general demurrer to a bill, the decree of the chancellor in favor of the demurrer was reversed by the court of appeals, but a part of his decision, as expressed in his opinion, was approved.—*Held*, that, after the decree of the court of appeals had been remitted to this court, the defendants could apply, under the two hundred and fifteenth rule, and have stricken out of the bill so much thereof as was held to be objectionable by that part of the decision sustained by the court of appeals; such proceeding being tantamount to an amendment of the original demurrer.

Kirkpatrick v. Corning.

Bill for relief. Motion to strike out parts of bill.

Mr. T. N. McCarter, for the motion.

Mr. F. B. Candler, of New York, *contra*.

THE CHANCELLOR.

The defendants, Corning, Ludlum and wife and the Pompton Steel and Iron Company, move to strike out certain specified parts of the bill under the two hundred and fifteenth rule, which provides that any objection to a bill, or any answer or special replication, or any part thereof, may be made and adjudicated upon on motion without the filing of a demurrer or exceptions, but the notice of such motion (which shall be an eight days' notice) must state the particular ground or grounds of objection. The rule also provides that the making of a motion under it shall be deemed a waiver of the right to demur or except. The ground stated in the notice in this case is, that the decision of the court of errors and appeals in this suit has rendered the allegations objected to irrelevant and impertinent, and has relieved the defendants from all obligation to answer them, and has determined that the complainant is not entitled to any relief on account thereof. The decision referred to (*Kirkpatrick v. Corning*, 11 Stew. Eq. 234) was upon the demurrer, which was a general one. It reversed the decree of this court (*Kirkpatrick v. Corning*, 10 Stew. Eq. 54) sustaining the demurrer. This motion is opposed on the ground that the chancery act (*Rev. p. 109 § 31*) provides that if the plea or demurrer filed by a defendant be overruled, no other plea or demurrer shall be thereafter received; but in such case the defendant shall file his answer to the complainant's bill in forty days after such overruling; and, if he fail to do so, the bill shall be taken as confessed &c.; and it is argued that the demurrer having been overruled and the defendants ordered to answer, they cannot again demur; this motion being, in fact, a new demurrer. But, although the act declares that after a demurrer has been overruled the defendant shall answer, it has always been held that it is in the discretion of the court in such case to permit him to file

Kirkpatrick v. Corning.

a plea instead of an answer. *Hall v. Nicholson* (1836), *Stew. Dig.* 434; *White v. Dummer* (1841), 1 *Gr. Ch.* 527; *Sceley v. Price* (1845), 1 *Hal. Ch.* 231. In the English chancery practice there have been instances in which a general demurrer has been allowed in part only (*Mitt. Pl.* 214), but the practice there is, as it is here, to overrule the demurrer if not good to the whole bill, though it might have been good if filed as to part only. In such cases, however, leave will sometimes be given to amend the demurrer, so as to confine it to the objectionable part of the bill. 1 *Dan. Ch. Pr.* (4th Am. ed.) 584. See, also, *Story's Eq. Pl.* § 459. And such is the practice of this court. *Vanderveer v. Stryker*, 4 *Hal. Ch.* 175, 186; *Marsh v. Marsh*, 1 *C. E. Gr.* 391. Such leave to amend has in the English practice been given even after judgment on the demurrer. *Baker v. Mellish*, 11 *Ves.* 68.

In the case in hand the demurrer was sustained in this court. The appellate tribunal reversed the decree, but expressed an opinion that the view of this court was correct as to part of the bill. An application to amend the demurrer, if made, would not have been entertained by the court of appeals. When its decree of reversal came to this court, it was, according to the practice, made the decree of this court. So that in this case the application to amend was necessarily made after the decree overruling the demurrer. The bill, amongst other things, attacks the proceedings prior to the decree in the foreclosure suit, and seeks to open the decree to enable the complainant to avail himself of the defence of usury in the mortgages, at least to the extent of obtaining a reduction in respect of premium or *bonus*, alleged to have been taken upon the loan secured by the mortgages. This court was of opinion that the decree is conclusive against him, and the court of errors and appeals concurred in that opinion. All that part of the bill, therefore, which has reference merely to that matter, should be stricken out as impertinent and irrelevant. This court was of opinion, too, that the sale of the personal property to Corning was conclusive upon the trust now represented by the complainant in this suit, and there is nothing in the opinion of the court of errors and appeals expressive of dissent on that head. This motion is, in effect, an application to amend the de-

Third National Bank v. Cary.

murrer so as to confine it to that part of the bill which both here and in the court of last resort was held bad, and to strike out that part of the bill. It will be granted. The parts of the bill mentioned in the notice will all be struck out.

THE THIRD NATIONAL BANK OF THE CITY OF NEW YORK

v.

SPENCER C. CARY et al.

The circumstances in this case prove a resulting trust in the defendants' deceased brother, whose heirs-at-law the defendants are. As there is no evidence that the answering defendant knew of the existence of the trust, he is entitled to his costs.

Bill for relief. On final hearing on pleadings and proofs.

Mr. James Flemming, for complainant.

Mr. E. D. Deacon, for answering defendant.

THE CHANCELLOR.

The bill is filed to establish a resulting trust in favor of the complainant, as to certain land in Jersey City, of which William H. Cary died seized. He died June 5th, 1881. The property was conveyed to him in July, 1879, by sheriff's deed dated November 21st, 1878. When the property was conveyed to him he was in the employ of the complainant as coupon clerk (a responsible position indicating great confidence on the part of the complainant in his integrity), and he continued to be so up to the time of his death. The property was bought in for the complainant by its solicitor at the sheriff's sale, which was under execution on a decree in a foreclosure suit in this court. The price was the amount due, \$3,686.74, on the first mortgage on the

Third National Bank v. Cary.

property, held by Mrs. Mary E. Toffey. The complainant held the second mortgage, on which there was due, at the date of the decree, the sum of \$24,660.76, and the decree was for the sale of the mortgaged premises to pay both mortgages. The sale took place on the 21st of November, 1878. The purchase-money was paid by the complainant, and it paid for recording the deed to Cary, which was given to him by the sheriff at the direction of the complainant's solicitor. The complainant paid all the arrears of taxes on the property. It has had possession of it and has taken the rents ever since the sale. Cary died intestate. He was never married. The defendants are his brothers and sisters, the wives of those of the former who are married, and the husbands of the latter, Samuel Cary, senior, Cary's administrator, and Benjamin S. Clarke, who claims to be a creditor of Cary's estate. Spencer C. Cary, one of the brothers, is the only defendant who has answered and litigated the matter. His answer denies the trust, and that the property was paid for by the complainant, but alleges that though the complainant may have actually paid the purchase-money, Cary was permitted to buy the property in order thus to pay or secure to him money which he was then entitled to receive from or through the complainant for compensation for services rendered by him to it or other persons.

The proof is clear that the property was bought in for the complainant by its solicitor, that the purchase-money was all paid by the complainant on its own account, that the property was conveyed to Cary for the benefit, and only for the benefit of the complainant, and that he never had possession, but the complainant always had it, and took the rents from the time of the sheriff's sale. On paying the purchase-money the complainant's solicitor took for its security an assignment of the first mortgage and the decree for the payment thereof. There is no room to doubt that Cary held the property under a resulting trust in favor of the complainant, and there are no circumstances in the case to hinder this court from declaring the trust as against the defendants. There will be a decree accordingly.

There is no reason to conclude that Spencer C. Cary had such

Smith v. Gummere.

evidence of the facts as not to warrant him in putting the complainant to proof of its equitable claim to the property. He has offered no evidence in the case, but has submitted the matter to the decree of the court on the proofs presented by the complainant. It appears by the evidence that the complainant intended to take a declaration of trust from William H. Cary, and that the latter went (in 1879) to the office of its solicitor to execute the paper, but it would seem that it was not executed merely because it had not been drawn, and the matter through inadvertence was not attended to afterwards, although Cary did not die until June, 1881, and was in the employ of the complainant up to that time. Under the circumstances it is proper that Spencer C. Cary should have his taxable costs of this suit.

MARY K. SMITH, by her guardian,

v.

BARKER GUMMERE et al., admrs. &c., et al.

The defendants' intestate was appointed general guardian of complainant, his granddaughter, in February, 1865, and special guardian to sell some of her lands in July, 1865, and he gave sureties in each capacity. He sold those lands but never rendered any account of the proceeds, nor of his disposition thereof after his report of the investment thereof, made soon after they came to his hands, and never filed any account as general or special guardian. His ward, who was born in 1863, always lived with him thereafter. He died insolvent in 1881. On exceptions to a master's report as to the allowances to and charges by the guardian, and as to his sureties' respective liabilities—*Held*, that the cost of furniture purchased for and used by the ward should be allowed; that the time when she was absent from his house during her school vacation should be deducted from his charge for board; that he should be charged with the amount of rent he would have received from the ward's house if he had kept it in tenantable condition; that the report of the sale (not carried out) of that property, signed by him, although never filed, was competent evidence as to the terms &c. of that sale to charge him with rent for the property; that he should be charged with interest annually on the amounts originally received by him as general guardian, and interest on the rents, but

Smith v. Gummere.

the proceeds of the sale of the lands should not be included therein, nor the interest on those proceeds, because, for them, his sureties as special guardian are solely responsible, since he never obtained any direction from the court to transfer those proceeds to his account as general guardian. The proper credits for board, clothing, pin-money, wages of a nurse, and for taxes, under the circumstances, fixed—*Held, also*, that the special guardianship fund is entitled to no part of the allowance for board, clothing &c., unless the amount of those allowances should prove greater than the debits of the general account, in which event the excess should be credited on the account of the special guardianship.

Bill for relief. On exceptions to master's report.

Mr. G. S. Cannon, Mr. Mercer Beasley and Mr. E. T. Green,
for complainant.

Mr. J. S. Aitkin, for the surviving administrator.

Mr. James Buchanan and Mr. A. G. Richey, for W. J. Owens.

THE CHANCELLOR.

The bill is filed by Mary K. Smith, a minor, by General Mott, her guardian, against the administrators of her deceased guardian, her grandfather, Frederick Kingman, Esq., and his sureties in two bonds, one given as her general guardian and the other as her special guardian, appointed in proceedings in this court for the sale of land of hers at Edgewater in this state. The defendants, Samuel K. Wilson and Jonathan Steward, are the sureties in the bond given as general guardian, and Mr. Steward and William J. Owens are the sureties in the other. The object of the bill is to ascertain what amount is due to the complainant on each account, and to collect the amount by these proceedings from the sureties, the guardian having died insolvent. He was appointed general guardian February 9th, 1865, and special guardian July 3d, 1865. He never filed any inventory or account of his general guardianship, and made no report in the special guardianship after that in which he reported that he had invested \$7,000 of the proceeds of the sale of the land (\$7,200) in United States treasury notes of the second and third series of the seven-

Smith v. Gummere.

thirty loan. The ward was born in Mr. Kingman's house, August 28th, 1863. Her mother died two days afterwards, and her father, who was Lieutenant-Commander Watson Smith, of the United States navy, died December 19th, 1864, when she was about one year and four months old. As general guardian Mr. Kingman received \$2,829.79 from the administrators of her father, besides prize and pension-money from the United States government. He also collected the rent of a house and lot of hers (called in the proceedings the Lambertson property) on the corner of Second and Lalor streets in the sixth ward of Trenton. As special guardian he received the proceeds of the sale of the Edgewater property, \$7,200, subject to the payment of the costs and expenses of the proceedings and his commissions. He appears to have made no investment of any of the money of the minor other than that before referred to, except that on the 31st of March, 1875, he took an assignment to himself, as guardian of the complainant, of a mortgage for \$5,000 on his own dwelling-house in Trenton, subject to which mortgage he about a year previously had bought the property. On the envelope in which the bond and mortgage were enclosed, he wrote the word "canceled." They were not, in fact, canceled, but were valid securities at the time of his death. He died March 28th, 1881, and General Mott was appointed, in his stead, general guardian April 5th, 1881, and special guardian on March 14th, 1882. Mr. Kingman has left no account of either of the trusts, nor anything from which his dealings with them or either of them or the property thereof can be ascertained. By the order of reference in this cause, the master was directed to take and state an account as fully and as far as practicable, between the complainant and the administrators, of the moneys of the former which were in Mr. Kingman's hands as her guardian, and any investments, earnings or increase thereof, and to state a separate account, if practicable, of the disposition and investment by him of the respective funds received by him as general and as special guardian, and of the earnings or increase of those funds respectively, and to state an account of all Mr. Kingman's disbursements for the ward's support or benefit, and of all allow-

Smith v. Gummere.

ances to which his estate is entitled on those accounts. He reported that Mr. Kingman's estate should be allowed for the board and maintenance of the ward \$5 a week for the period between 1865 and 1870, \$6 a week from 1870 to 1879, and \$7.50 a week after the last-named year; that he had made the following deductions for absence: In 1874 five months, in 1875 nine months, and in 1878 six months, and had allowed nothing for the board and maintenance of the ward in 1881, because she was not at Mr. Kingman's house in that year. He reported, also, that he had allowed for the board and wages of a nurse for one year, and that he found due from the guardian's estate on the 15th of March, 1882, on account of the general guardianship, \$12,556.50, and on account of the special guardianship, \$7,003.97, the latter sum being the price for which the Edgewater property was sold, after deducting costs, expenses and commissions. He also reported that in stating an account of the interest-money received by Mr. Kingman as general guardian, he had assumed that all the interest money received by him (whether on the one account or the other) had been received as general guardian, and had been used, so far as necessary, in the care, maintenance and education of the ward.

Exceptions to the report were filed by the complainant, by the surviving administrator of Mr. Kingman and by Mr. Owens, one of the sureties on the bond given by Mr. Kingman as special guardian. The complainant filed eleven exceptions, the administrator fourteen and Mr. Owens nominally four, but actually fifteen.

As to the complainant's exceptions, the first challenges the propriety of an allowance of \$40.63, the amount of a bill of furniture (a bureau, a child's table and a bedstead), bought in 1869 by the guardian for the sole use of the ward. The exception states that the ward had at that time, in her guardian's house, a large quantity of furniture which she had derived from her father's estate, and which was sufficient for her use. There is, however, no proof on that subject. Under the circumstances it was proper to allow the amount of the bill. It appears by the testimony of the ward's aunt, Mr. Kingman's daughter, that after

Smith v. Gummere.

the guardian's death the ward gave away the child's table (it cost only \$1.63) as a present to a little cousin of hers, and took away with her the bureau and the bedstead. Those articles were purchased for her comfort, and undoubtedly were necessary for her. It is to be borne in mind that she was not a boarder in a boarding-house, nor was she among strangers. A boarding-house keeper is bound to furnish the necessary articles of furniture for the use of the boarder. But here the orphan child was kindly furnished with a home in her grandfather's house, and it seems quite proper to allow, in the guardian's account, the cost of the articles in question, which were bought for her special use and to promote her comfort and convenience there. The table, it may be remarked, would seem to have been a toy.

The second and third exceptions are, that the master has not charged the amount of certain prize-money received by the guardian in 1874 and 1875 from the administrator of the ward's father in two payments, one \$504.38, July 4th, 1874, and the other \$256.07, November 20th, 1875. These exceptions are sustained. The amounts should be entered on the debit side of the account.

The fourth and fifth exceptions are based on a mistake, and were abandoned on the hearing.

The sixth is an objection that the amount of pension-money with which the master has charged the guardian for 1879 is less than the amount received. The exception is well taken. The amount should be \$280.60, instead of \$255. There is an error of \$25.60.

The seventh exception is, that the master in charging the ward for board in the years 1871, 1872, 1873, 1876, 1877, 1879 and 1880, has made no deductions for her absences from the guardian's house in those years. General Mott testifies that from 1871 to 1881 she was at his house as a visitor, during her vacations, from ten to twelve weeks in each year. He also says that from 1877 to 1881 she spent part of every week—that is, from Friday to Monday—at his house. There should be a deduction for ten weeks' vacation in each of the years mentioned in the exceptions, but not for the weekly visits.

Smith v. Gummere.

The eighth exception is, that the master has made no deduction for absence of the ward in 1880, but has allowed the guardian for her board for the entire year. The exception is well taken. The proof is from the testimony of General Mott (and it is supported by that of Mrs. Welling on the subject) that the ward was away from the guardian's house for nine months of that year. The former testifies that her washing for the whole of the year was done at his house. The charge should be for only three months' board in that year.

The ninth is, that the master has credited the guardian with \$90 for pocket-money for the ward for 1881. Among the items, on the credit side of the account for that year, is one of \$75 without prefix, or any statement or indication as to what it is for, and the other is for "allowance, \$15." These two constitute the supposed allowance of \$90 for pocket-money to which objection is made by the exception. It is suggested that the master intended to allow the \$75 for clothing for that year, but there is no evidence of it. In 1881, from the beginning of the year up to within a day or two of her guardian's death, the ward was living with General Mott. The master has therefore allowed nothing for her board. The item of \$75 should be stricken out, but there should be a credit of \$30 for clothing for that year, and the allowance of \$15 should stand.

The tenth exception is, that the master has not charged the account with the rent of the Lamberton property for two years and a half of the period between 1874 and 1878. He has charged no rent for any part of the period between those years; so that there is not only no charge for rent for two years and a half of the time, but there is none for any part of the whole four years. The evidence shows that the property was unoccupied for some months before March, 1875, when a man named Lacy took possession of the premises under an agreement between him and the guardian for the sale of the property to him. The reason why it was not rented appears to have been that it was so much out of repair. It was the duty of the guardian to put it in tenantable condition. He had the means to do so. He let Lacy into possession under the contract. That agreement was made

Smith v. Gummere.

on the 2d of March, 1875, and stipulated for the delivery of the deed on the 1st of April then next, provided the guardian should be able to obtain authority from this court to make the conveyance. It appears, by a report of sale of the property to Lacy under proceedings in this court, made in April, 1877 (the order for sale was made in the same month), that the agreement was that Lacy was to pay \$2,250 for the property, of which sum \$850 were to be paid in cash, and for the remaining \$1,400 he was to give a mortgage, the interest whereon, up to the time of giving the deed, he was to pay in lieu of rent, and the interest on the balance of the purchase-money was to be allowed him for the repairs necessary to make the premises tenantable. The report also states that Lacy had occupied the property under the agreement to the date of the report, April 26th, 1877, and had paid the interest on the mortgage in lieu of the rent from the 1st of April, 1875. The interest on \$2,250 for those two years was \$315 (the legal rate at that time was seven per cent. per annum), and for this the guardian is clearly chargeable. The report was never filed, but it is signed by him as guardian. It was offered in evidence, as appears by the record, but was objected to, and was not marked as an exhibit. It is competent evidence as an admission on the part of the guardian as to the sale and the terms of it, and that he had received the interest in lieu of rent. The repairs appear to have been made by Lacy. Mr. Hawk testifies that they cost Lacy \$500 or \$600. Without the evidence of the paper just alluded to, the guardian would, under the circumstances, be liable for the rent. No excuse is offered or appears, except from that instrument, for permitting Lacy to occupy the property for two years without paying rent. It appears that Lacy did not take the property. He rented it to another person, one De la Rionda, in June, 1877, who occupied it until October of that year. The guardian should be charged with \$50 for the rent for that time also. It will have been seen that no charge is made for the year between April, 1874, and April, 1875. It is proved that the guardian lost some of the rent due from tenants, and losses to the amount of about \$96 are sworn to by Mr. William L. Ashmore, but he cannot say that the money was not

Smith v. Gummere.

eventually collected by Mr. Kingman. Compensation for non-allowance in respect to such moneys is found in the fact that no charge is made for rents for 1874, and there is the further consideration on this head that there is no clear proof as to what rent the guardian received for much of the time, nor as to what rent, if any, he failed ultimately to collect. In the absence of any account on the part of the guardian, the presumptions are against him. But, further, the master has charged rent at the rate of only \$100 a year from January 1st, 1865, to April 1st, 1874. Now, it is by no means clear that the guardian did not receive a much larger amount than that. In 1878 he rented the property to Hendrickson at \$120 a year, and it seems very clear, from entries in one of his books, that he rented it for \$150 a year in 1865. It is quite probable that, if the facts were known, a full compensation for all losses would be found in the difference between the rent actually received and the amount charged by the master, to say nothing of the fact before mentioned in this connection that no charge is made for 1874.

The eleventh and last exception on the part of the complainant is, that the master allowed \$150 for clothing for the ward, in 1880, although it appears that there is an unpaid bill of \$43.18 for clothing of the ward for that year, which the present guardian is called upon to pay. The amount of that bill should be deducted from the \$150, and the credit should be for \$106.82, instead of that sum.

To consider the exceptions on the part of the surviving administrator:

The first and second, taken together, are that the master has erroneously charged the estate of the guardian with interest on annual balances, and that those balances are erroneously made up, and also that he has improperly included in the account of the general guardianship the interest on the proceeds of the sale of the Edgewater property. The guardian should be charged with interest on annual balances, but otherwise the objections are well taken. The guardian received, as general guardian, the following moneys of his ward during the first year: from the administrator of her father, \$2,829.79; pension, \$255, and rent

Smith v. Gummere.

of the before-mentioned property in Trenton, at least \$100; altogether, \$3,184.79. Under the circumstances, he is chargeable with interest on the money from the time it came to his hands, and the master has so charged him. The master has also charged him with five and a half months' interest on \$7,003.97, the net proceeds of the sale of the Edgewater property, \$7,000 of which, according to Mr. Kingman's report in his special guardianship, made, as before stated, July 29th, 1865, he had invested in government securities. But had that interest actually been in Mr. Kingman's hands at that time, as it well may have been, he could not lawfully have applied it to the purposes of his general guardianship. He was accountable to this court for that money, and had given security to it for the just and faithful performance of the trust reposed in him as special guardian in reference to that fund, and for his observance of such orders as the chancellor should, from time to time, make in the premises in relation to that trust. He could not have obtained authority to make such application of the interest to the purposes of the general guardianship, except by formal application to this court for the payment of the funds of the special guardianship to him as general guardian. The statute requires that, in granting such applications, the chancellor shall see to it that proper security is given before making the order. *Rev. p. 483 § 10.* And, if he be satisfied as to the security, still it is discretionary with him whether to make the order or not. *In re Anderson, 2 C. E. Gr. 536.* Mr. Kingman never obtained such an order. To have paid out the money for the purposes of the general guardianship, without authority, would have been a breach of his duty as special guardian, for which his sureties on the bond given to this court would have been liable to answer. To charge his account as general guardian now with the interest which he received, or should have received as special guardian, is to make his sureties on his bond as general guardian liable for money which he never received on that account, and for which he was bound to answer to this court, and for which his sureties on his bond as special guardian are liable. In fact, he may never have received the interest in question at all. If he sold the government bonds the

Smith v. Gummere.

next day after he made his report, and never re-invested the money, but used it for his own purposes, he had not the interest to apply to the purposes of the general guardianship. Under such circumstances, to charge his account as general guardian with the interest, is to charge his sureties in that matter with the damages for his breach of duty in the other trust, and to shift the burden of liability from the shoulders of the sureties on his bond as special guardian to those of the sureties on the other bond. As the account is now stated, the sureties on the bond given for the special guardianship are relieved of all responsibility for the interest on the fund and the liability transferred to the sureties on the other bond. The accounts must be restated. The restatement will render necessary a new calculation of the interest on the annual balances.

The third exception is, that the master has made an insufficient allowance for the board of the ward in each year. He has allowed from 1865, when she was about two years old, to 1870, when she was about seven, \$5 a week; from 1870 to 1879—that is, from about the age of seven to sixteen—\$6 a week; and after 1879, \$7.50 a week. He has also allowed \$260 for the board and wages of a nurse for her for the first year. At the end of that year the ward was about two and a half years old. The allowance seems to me to be sufficient under the circumstances. The ward, indeed, had at her grandfather's house advantages which she could not have had anywhere else. She had kind attentions on the part of her relatives, and had the benefit and pleasure of a home with a family of refinement. Nevertheless, the allowance seems to be sufficient. It was her good fortune to find a home with her relatives, as it undoubtedly was their pleasure to extend to her, in her orphaned condition, that tender attention which affection gladly bestows, but which money cannot buy.

The fourth exception is, that the master has made an insufficient allowance for the clothing of the ward. He has allowed nothing for 1865; \$50 a year for 1866 and 1867; \$75 a year for 1868 and 1869; \$100 a year for the next four years; \$125 a year for the next three years; and \$150 a year for the rest of

Smith v. Gummere.

the time. The allowance, so far as made, seems to me to be reasonable, but there should be an allowance of \$30 for clothing in 1865.

The fifth exception is, to the non-allowance for the wages and board of a nurse for the ward after 1865. The proof is, that a nurse was kept for her, exclusively, during the first year (1865), and the master has allowed \$247 for the board and wages of the nurse for that year. That allowance is proper, and is all that the evidence will warrant.

The sixth exception objects to the non-allowance in the credits for board, care, maintenance, room-rent and guardianship of the ward for time during which she was absent from home. This matter was considered and disposed of under the complainant's seventh exception. The exception is overruled.

The seventh exception, which is to the non-allowance of compensation for the use by the ward in her instructions in music in the guardian's house, of a piano belonging to him, cannot be sustained.

The eighth exception is to the non-allowance of any sum for music, books and stationery in 1879. There should be an allowance of \$15 on that account. There appears to be no reason for omitting the allowance for that year.

The ninth exception is to the non-allowance for the years from 1871 to 1881 for pin-money furnished by the guardian to the ward. The proof is that he furnished such money to her. The objection should be sustained, and there should be an allowance of \$12 a year from 1869, when she was six years old, to 1877, including the latter year, and \$60 a year from 1878 to 1880, both inclusive, and, as before adjudged, \$15 for 1881.

The tenth exception alleges that the master has omitted to make due allowance for taxes paid by the guardian on the ward's property for 1877, 1878, 1879 and 1880. The objection is well founded. The guardian appears by the vouchers to have paid taxes on the Lamberton property for those years as follows: For 1877, \$22.50; for 1878, \$19.12; for 1879, \$19.13, and for 1880 the same amount. He paid, also, in 1869, \$28.13 for taxes on the same property, which are not credited but should be

Smith v. Gummere.

allowed. It appears by an examination of the vouchers that there are errors in some of the credits for taxes. Instead of the credit of \$28.13 in each of the years 1871, 1872 and 1873, there should be a credit of \$34.50 in each year. Instead of the allowance of \$34.50 for taxes in 1874 and 1875, the allowance in each year should be of \$28.13, and instead of \$25.50 in 1876, the credit should be of \$22.50.

The eleventh exception is on the ground that the master has made no allowance for losses in the collection of rents for the Lamberton house, and hence has overcharged the guardian for those rents. This subject was dealt with under the tenth exception on the part of the complainant. The exception is overruled.

The twelfth exception is based on the allegation that the master, while he has charged the account with the rents of the Lamberton property, has not allowed for the taxes paid. Some of the taxes were allowed, but, as before stated, others were not. The errors on this head were pointed out under the tenth exception on the part of the complainant.

The thirteenth exception is an objection to the master's charge of interest on the rents of the Lamberton property. It alleges that he has erroneously charged interest, and (if interest be chargeable) on an incorrect amount, and for an improper length of time. It should be remarked that in the account "the rents of that property should constitute part of the charges in the years in which they are held to have been received, and not as in the account under consideration, be segregated in a separate statement and the balance only taken into the account at the end." The objection is not well founded. It has already been said that the master has charged too small an amount of rents. As to the charge of interest on rents, he has in fact charged far too little. On \$759.35 collected between January 1st, 1865, and April 1st, 1874, he has charged interest for only four and five-eighths years, instead of for the whole time since the rents were collected, as he should have done. He has also charged too little interest on the rest of the rent.

The last, the fourteenth, exception is a general one that the balance reported against the guardian is too great. Since the

Smith v. Gummere.

account must be restated it is unnecessary to pass upon this exception.

It remains to consider the exceptions filed by Mr. Owens. His first exception is an adoption of the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth exceptions of the administrator. They have, therefore, been considered and passed upon. The first, fourth, eighth, ninth, tenth and twelfth were allowed, and the others overruled.

The second exception is that the master has not credited the fund of the special guardianship with any of the allowances for board, clothing, attendance or money furnished by the general guardian to or for the ward, but has credited all of them to the account of the general guardianship. It has already been said that the master ought not to have taken the moneys of the special guardianship fund into the account of the general guardianship. For the same reason the special guardianship fund is entitled to no credit on account of the allowances mentioned in this exception, unless it should prove that the amount of those allowances is greater than the debits of the general guardianship account, in which case equity would require that the excess be credited on the account of the special guardianship.

The next exception is that the master credited the amount of the before-mentioned mortgage entirely to the account of the general guardianship, and no part of it to the other fund. When the accounts are properly made up, it can then be seen where that mortgage should be credited, but it cannot be told before that time. There is no evidence to show out of which fund the money invested in the mortgage was taken. The investment took place in 1875, ten years after the special guardian's report of the investment of the money derived from the sale of the Edgewater property in government securities was made. An equitable application of it must be made, but it is impossible to make such application before the true state of the accounts of the general guardianship is ascertained.

The last exception is of a general character—that the balance found to be due on the special guardianship account is too great. The master has charged the special guardianship with only the

Palmateer v. Tilton.

principal of the investment in government bonds. That is too little. He should have charged it with the interest also. The exception is overruled.

The report will be sent back to the master with directions to restate the accounts in accordance with the views expressed in this opinion. Of the complainant's exceptions, eleven in number, nine are sustained and two overruled. Of those of the administrator, fourteen in number, six are sustained and seven overruled. One is not passed upon. Of those of Mr. Owens, which are practically fifteen in number, for his first exception adopts twelve of those of the administrator, seven are allowed and eight overruled.

AMOS PALMATEER et al.

v.

JOHN P. L. TILTON, admr., et al.

On a bill by the alleged vendee against an administrator *cum testamento annexo*, for the specific performance of a contract for the sale of lands alleged to have been made by the executor, who had a testamentary power of sale, the vendee is incompetent to prove the contract.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. C. Robbins, for complainants.

Mr. W. H. Vredenburg, for defendant Tilton, administrator.

THE CHANCELLOR.

This suit is for the specific performance of an agreement for sale of land. It is brought against the administrator *de bonis*

Palmateer v. Tilton.

non with the will annexed of William A. Harvey, deceased, late of Monmouth county, the devisees under the will, and the husbands of such of them as are married women, and the holder of a mortgage given by Mr. Harvey and his wife on the premises and other land. The property in question is a small piece of land in what was called Central Park, a tract lying between Key East and Ocean Grove, near the sea-shore, in Monmouth county. It is wholly unimproved, and lies back from the shore. It contains eighty-six hundredths of an acre. Mr. Harvey owned it at the time of his death. By his will he gave his wife all the residue of his real estate after payment of his debts, and so much of his personal property as she might choose to take, and fully authorized and empowered her to sell and convey (but only for her support) the whole or any part of his estate, real or personal. And he ordered his executor to sell all his personal property not taken by his wife, as soon as convenient after his death, and so much of his real estate as would be necessary to pay his debts and funeral expenses; and provided that such sale of his real property should be either public or private, as the executor should think best, and on such terms and conditions, and in such quantities as he should think and adjudge to be for the interest of all persons interested in the estate. And he further provided that the surplus of the proceeds, after payment of his debts and funeral expenses, and the cost and charges of selling and of settling up his estate, should be paid over to his wife. He appointed Abner Allen his executor, who proved the will May 24th, 1875. The complainants allege that on the 5th of March, 1881, Mr. Allen sold to them the land in question for the price of \$500, then agreed upon between him and them, of which they then paid to him \$25, and were to pay the balance within a year from that time, and that the deed was to be delivered on the payment of that balance. Mr. Allen died May 6th, 1881, and the defendant, John P. L. Tilton, was appointed administrator *de bonis non cum testamento annexo* on February 27th, 1882. Amos Palmateer, one of the complainants, swears that he made the purchase of the property for himself and his brother John, and he details the circumstances. He says that

Palmateer v. Tilton.

when he paid the \$25 he took a receipt from Mr. Allen, drawn by the latter, and signed by him as executor of Mr. Harvey; that the receipt (which he says is lost) was as follows:

“Received March 5th, 1881, from Amos Palmateer and John Palmateer, \$25 on account of land south of toll-gate, of the estate of William Harvey, deceased, commencing at an iron plug on the east side of the railroad; thence running northeasterly until it strikes the centre of Evergreen avenue; thence running east along the centre line of Evergreen avenue until it strikes the centre of the turnpike; thence southerly as many feet as it is from the iron plug to the centre of Evergreen avenue, north; and the balance, \$475, to be paid within the year, and the deed to be given when paid.”

The Palmateers owned a triangular piece of land on the corner of Evergreen avenue (on the north) and the New York and Long Branch railroad (on the west), between the latter and the turnpike (on the east), which is parallel to the railroad, or nearly so, and they were desirous of buying of the estate of Harvey enough land adjoining between it and the turnpike road to make, in connection with their plot, a plot extending along Evergreen avenue from the railroad to the turnpike of the same depth on the turnpike as that which the triangular plot had on the railroad. The description in the receipt is of such a piece, but it does not, in the language of the surveyors, close; the last line is wanting. If the agreement were established, the description, especially in connection with the evidence outside of the alleged contents of the receipt, would be sufficient to identify the property. But the proof of the contract is not sufficient. The receipt is not produced. Amos Palmateer says it is lost. The evidence of the loss itself is not altogether satisfactory. He says he does not know where it is, nor how it got lost—not positively—but he has his ideas as to how it got out (of the safe). He does not, however, state what his theory is on that subject. But if it were conceded that the loss is sufficiently proved, the secondary evidence offered to establish the receipt is not sufficient for the purpose. The principal evidence on that head is the testimony of Amos Palmateer. He testifies to the giving of the receipt, and to its contents, but he is not a competent wit-

Palmateer v. Tilton.

ness. While the supplement of 1880 (*P. L. of 1880 p. 52*) to the act concerning evidence provides that—

“In all civil actions in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding, any party thereto may sue or be sued in a representative capacity,”

It also provides that the supplement shall not extend so as to permit testimony to be given as to any transaction with, or statement by, any testator or intestate represented in such action. It is true the testimony under consideration is not strictly within the language of the act, for Mr. Allen was not the testator, but it is within its spirit and meaning.

In *Colfax v. Colfax*, 5 *Stew. Eq.* 206, the prohibition was held to apply to a case where heirs-at-law were sued for specific performance, and it was there said that the proviso was intended to protect the estates of deceased persons against the substantiation of claims by the oaths of parties prosecuting or defending suits directly affecting the estate. Also, that the object of the legislature, in making the proviso, was to guard against the injustice which would arise from a want of mutuality in the exercise of the right to testify in one's own behalf. While in this case Mr. Allen was not, as before remarked, the testator, he was his representative, clothed with power to dispose of his estate. Many of the evils to be apprehended from permitting one who presents a claim against the estate of a decedent to substantiate it by his own testimony, as to the statements of, or his transactions with, the deceased, are to be apprehended from permitting one who makes a claim to that estate, based on the agreement of the deceased executor, to testify in his own behalf to the statements of, or his transactions with, the executor in the matter. It must be held that the prohibition extends to such cases. The contrary construction would leave an estate which has been in the hands of a trustee who has died, subject to be charged by false allegations of contracts of sale, or other disposition or encumbrance, to the disadvantage of those interested therein, upon the mere oath of the claimant, which there would be no means of controverting.

Palmateer v. Tilton.

because of the death of the trustee. Striking out of the record the testimony of Amos Palmateer on the subject of the agreement, there is no proof to sustain it. George C. Allen, son of the executor, indeed, swears that his father sold a piece of land of the Harvey estate, on the west side of the turnpike, to Amos Palmateer; that the latter then paid to his father money—\$25—on account of the purchase, and that his father gave Palmateer something in the way of a writing, but he does not know what the paper was. He says his father wrote the paper, and that it took him only about two or three minutes to do it. Ezekiel C. Allen, another son, who was present, testifies to the fact that Amos Palmateer on that occasion came to see his father to purchase land of the estate of Harvey, and he says he supposes and has no doubt it was land on the west side of the turnpike, but he knows nothing of the payment of any money, or the giving of any receipt or paper by his father. It should be stated that Amos Palmateer testifies that on that occasion he bought from Mr. Allen five lots of the estate, on the east side of the turnpike, for \$100, and paid \$25 on account of the purchase-money, and took a receipt therefor drawn and signed by Mr. Allen, which he produces. George C. Allen speaks of only one sale, and of the payment of only one sum of money, and of the giving of but one paper. The receipt for the five lots consists of but seven lines, and may well have been the paper which George says his father wrote in two or three minutes. It is not at all probable that Mr. Allen could have written the receipt which Amos Palmateer swears he gave him for the land on the west side of the turnpike, in two or three minutes, or any such very short time. According to Amos Palmateer's testimony, it contained a carefully worded description of the land, or, at least, of the lines constituting three sides of it, and it must have been twice as long as the receipt just spoken of. Here it may be remarked that the receipt for the land on the east side is for \$25, and provides for the payment of the balance of the purchase-money in one year, and for the delivery of the deed on the payment thereof. A few words may be said in regard to the testimony of George C. Allen as to the land which was sold by his father, as executor, to Amos

Palmateer v. Tilton.

Palmateer. He says it was on the west side of the turnpike, but he only knows of one sale, and there was a sale of land on the east side made at that time on which, as before stated, \$25 were paid and a receipt given. It is quite possible that that is the transaction of which he speaks, and that he is in error as to the location of the land. John Palmateer, one of the complainants, testifies that the same evening in which Amos went to Mr. Allen's to buy the lot (on the west side of the turnpike), Amos showed him a receipt for \$25 paid on account of the purchase-money of that land. He says he cannot remember how the receipt read, nor what it contained, but he remembers that it was for \$25, and that they were to have the deed inside of a year. He further says that he never saw the receipt after that night. He does not say and it does not appear that he knew the handwriting of Allen. Nor does he say in whose handwriting the receipt was, nor that it purported to be signed by Allen. It may be added that he is incompetent as a witness, for the reason before stated in connection with Amos's testimony. William C. Kelly, the brother-in-law of the complainants, also testifies to the receipt. He says he saw it two or three days after the purchase was made; that it was on a piece of paper about three inches wide and seven or eight long; that Amos Palmateer handed it to him and he, Kelly, remarked "It is the old Quaker's [meaning Mr. Allen's] writing," and Amos said that he, Amos, wrote it himself, and that Allen called up his sons and daughters to witness the transaction. This paper was not the one of which Amos speaks, for Amos swears that Allen wrote and signed that receipt, while the receipt which Kelly saw and read was written by Amos, as the latter himself told him. Kelly testifies that he does not know Allen's signature; that he never saw it, except on that occasion. The proof of the contract is insufficient. There is, in fact, no competent evidence of it at all. The bill will be dismissed, with costs.

Cuming v. Robins.

JAMES R. CUMING, trustee &c.,

v.

BRIDGET ROBINS et al.

General, indefinite verbal statements by a trustee are insufficient to fasten the trust funds upon his individual real estate.

Bill for relief. On final hearing on pleadings and proofs.

Mr. C. T. Cowenhoven, for complainant.

Mr. J. H. Stone, for defendants.

THE CHANCELLOR.

The object of this suit is to obtain a decree declaring that certain real estate in Middlesex county, described in the bill, and of which Wright Robins, deceased, late of that county, died seized, is trust property. John Robins, late of the city of New York, deceased, by his will, after directing payment of his debts and funeral expenses, and giving a legacy of \$5,000, and directing his executors to sell his real estate, and ordering that the proceeds be deemed part of his personal estate, directed that his personal estate thus increased be divided into nine parts, one of which he gave to his niece, Maria Robins, and another to his niece, Caroline Robins, afterwards McClure. By the codicil to the will he revoked those gifts and gave one of the shares to his executors, in trust, to invest it and apply the interest or income thereof to the use of Maria for life, and at her death divide and pay the share, with all unappropriated income, to his then living nephews and nieces, the issue of any deceased nephew or niece to have his or her share; and, on further trust, in case of Maria's death before his decease, to pay over the share in like manner. And he gave the other share to his executors on like trust for Caroline for life, with like disposition in case of her death. He

Cuming v. Robins.

appointed his brother Nathan and his nephews, George W. and Wright Robins, executors. The two latter alone appear to have acted. The will was proved in New York. George had the shares of Maria and Caroline in his hands up to his death, and after that his executors paid them over, October 12th, 1868, to Wright. The principal of the two trusts appears to have been about \$320,000. Maria died in 1871. On her death Wright paid over to all who were interested in her share, except Theodore and Margaret Robins, two of the children of her deceased brother Amos, their portions thereof. He died March 10th, 1882. Caroline McClure is dead also. She died on or about December 1st in the same year. The complainants in this suit are Wright Robins, successor in the trust, and the persons entitled in remainder to the McClure trust fund. The bill states that up to and prior to his death, Wright Robins was embarrassed in his affairs, and, as the complainants are informed and believe, lost by stock speculations and otherwise all or the greater part of the McClure fund and the undistributed part of the other; that when he received those funds he was possessed in his own right of a large estate, and, as the complainants are informed and believe, disposed of a large portion of that property and of a large portion of those trust funds also, and that all that is left of either his private property or the trust funds is now "represented" by several parcels of real estate in and about Metuchen, in the county of Middlesex, a portion of which he mortgaged; and that the value of the entire property held by him at the time of his death will not exceed the sum of \$50,000; that when demand was made upon him for "the evidence or security of the trust funds," he stated that all the property in and about Metuchen in his name was "the security or property held in trust by him for the payment of the trust funds," and that it was "of the funds so held in trust by him." The defendants are his executrix and his widow and children and the testamentary guardian of his minor child. The bill originally embraced the undistributed part of the Maria Robins fund, but it was, on motion of the complainants, before the hearing, dismissed, so far as regards that fund, which

Cuming v. Robins.

has, as before stated, been distributed to all except Theodore and Margaret Robins, two of the children of Amos Robins, deceased.

There is no competent testimony that the money of the trust estate went into any of the real estate of which Wright Robins died seized, except that of Mr. Howe, the husband of Mary A. B. Howe, one of the complainants, and the testimony of Mr. Bookstaver, counsel of the guardian of the infant children of Amos Robins, deceased. The only evidence adduced is that of oral admissions by Mr. Robins.

The testimony of William R. Robins, one of the complainants, as to the statements and admissions of the trustee, is not admissible. The witness is not competent to give evidence, either of statements by, or transactions with, the deceased trustee on the subject. *P. L. of 1880 p. 52.* Mr. Howe says that he called on Mr. Robins to serve him with citations to account, issued by the surrogate of the city of New York; that Mr. Robins, after receiving the citations, said he was advised by his counsel that the New York surrogate had no jurisdiction over him as trustee, but that he wanted to do whatever was right, and that if the heirs would only be reasonable he would satisfy every one. He says Mr. Robins added, "Any way, it is all here in New Jersey, and none of it is in New York; why, this land is worth \$1,000 an acre, and there are a good many acres about here," or made some such expression as that; that he, the witness, then asked him if it was not true that he had recently mortgaged that property; to which he replied no, that he had only put a little mortgage on the house, and then added that they need not be afraid; that there was enough money of the estate invested in those and other lands in New York, which he did not particularize, to pay everybody in full. He further says that on the 5th of March, 1881, he had another interview with him; at that time he says he was in company with Mr. Bookstaver; that they asked Mr. Robins if it was true that the trusts were impaired, and he said he had been unfortunate in some of his investments; that in consequence of his long sickness he had been unable to look after them and added, "But there is enough right around here to pay everybody if they will only give me time." He further testifies that Mr.

Cuming v. Robins.

Robins added that for some of those lands he had only a little while before that time been offered \$100,000, and that there were some other tidbits, as he expressed it, lying around that would, if judiciously and properly sold, bring in a great deal of money, but he did not specify how much. To the question, "Where did he say the estate funds were when you asked him?" he replied, "Oh!" he said, waving his hand, "it is all around here in these lands I have been talking about." And the witness says Mr. Robins then made the statement before mentioned that he had been recently offered \$100,000 for some of the lands. He further says that, except as just stated, Mr. Robins did not tell him in what he had invested any of the trust funds, and that in referring to the property which he had purchased with the trust fund, he waved his hand and said, "It is all around here," and that when he said that, he was in the bedroom at his house in Metuchen, and pointed out of the window, or rather waved his arm, looking out of the window, and "indicated lands somewhere in the neighborhood." He adds, "I think the window was on the south side of the room. He never told me, nor specified, what personal investments he had made." Mr. Bookstaver, who was present at that interview, does not undertake to state what was said. He merely says that he has read Mr. Howe's testimony on the subject, and that it is correct; that everything is as Mr. Howe states it, except about the mortgage, which he cannot recall with sufficient distinctness to testify to it. The proof to establish, merely by the verbal admissions of a decedent, a resulting trust in his real property, must be of the clearest, most satisfactory and convincing character. *Cutler v. Tuttle*, 4 C. E. Gr. 549; *Boyd v. McLean*, 1 Johns. Ch. 582; *Midmer v. Midmer*, 11 C. E. Gr. 299, 12 C. E. Gr. 548. The evidence in this case is by no means of that character. It is not only very indefinite as to the property referred to, but also as to how or to what extent the alleged investment of the money of the estate was made in the property. The witnesses (Howe and Bookstaver) say that in the first interview Mr. Robins said that "it [presumably the trust estate] was all here in New Jersey and none of it in New York." They also say that he said, in the

Cumming v. Robins.

same conversation, that part of it was in New York ; for they say he said that there was enough money of the estate invested in his homestead property here and other lands in New York to pay everybody in full. In the other interview he merely said that he had enough property to pay off his debts to the trust estate.

In the first interview, which was the only one in which he is said to have stated that the money of the trust estate was invested in property in this state, he appears to have referred only to his homestead property. Mr. Howe says (the conversation took place in the house on the homestead property, where Mr. Robins then was sick) that Mr. Robins's language was : " Why, this land is worth \$1000 an acre, and there are a good many acres about here." The witness says he asked Mr. Robins if he had not recently mortgaged that property (the homestead), and the latter said no, he had only put a little mortgage on the house, and added that they need not be afraid, that there was enough money of the estate invested in those and other lands in New York, which he did not particularize, to pay everybody in full. The unreliable character of the evidence appears more clearly when it is considered that he had owned his homestead farm since 1859, nine years before he received the money of the trust. It seems altogether probable that what was said was in relation to the security which the beneficiaries of the trust had in the large amount of his private property, which he thought was sufficient in value to secure them against possibility of loss. Speaking in reference to a proposition that he should make an assignment of his property for the benefit of the trust estates, he said he was not going to give up his property unless those who proposed it could get a release from all those interested. In this connection, reference to the allegations of the bill will be in place. The bill states, on information and belief, that Robins lost all or the greater part of the trust fund in stock speculations or otherwise ; that when he received the trust fund from the executors of George W. Robins, he had a large estate of his own ; that all that is now left of the trust fund is " represented " by several parcels of real estate in and about Metuchen, of which

Van Houten v. Post.

the testator died seized, and that he stated that all the property in and about that place in his name, was the "security or property held in trust by him for the payment of the trust fund, and that the same was of the funds so held in trust by him." On the hearing no effort was made to fasten the trust on the whole property, but only on a tract which was conveyed to Robins by Wesley Benner, in the spring of 1871. The deed for that property was delivered on or about the 1st day of April in that year. The consideration, which was \$9,775, was paid in cash by Robins's individual check on the Phoenix National Bank, in the city of New York. There is no evidence that at that time (eleven years before his death) he was at all embarrassed in his affairs, or had lost any of his large estate. Nor is there any evidence that any of the trust funds were employed in the purchase of the property. The bill will be dismissed, but without costs.

CATHERINE VAN HOUTEN

v.

WILLIAM H. POST et al.

A testator provided as follows: "I give and bequeath to my dear, beloved wife, Rachel, about nine acres that is by south of Edo P. Mercellus's land called the new lane, and also all my movable personal property to be left to discharge my debts, and so much of my real property to discharge the remainder of my debts, if any wanting, and the remainder of my property, of what nature soever, during her widowhood. I give and bequeath to my daughter Caty the one equal fth part of the remainder, and the rest to my two sons John and George, equal, share and share alike." The will was proved December 28th, 1822. In 1823, the widow married Adrian Van Houten, who died in 1825. She continued in the possession of the nine acres until her death, in 1863, and her executors, to whom she gave a testamentary power of sale, continued to possess the premises until the filing of this bill.—*Held*, that, aside from the widow's and her executors' possession of the premises for about sixty years, the will gave her a fee simple in the nine-acre lot.

Van Houten v. Post.

Bill for relief. On final hearing on pleadings and proofs.

Mr. P. Stevenson, for complainant.

Mr. J. S. Barkalow, for George Post.

THE CHANCELLOR.

Adrian I. Post, by his will, dated June 3d, 1822, and proved December 28th in that year, made the following disposition of his estate :

"I give and bequeath to my dear, beloved wife, Rachel, about nine acres that is by south of Edo P. Mercellus's land, called the new lane, and also all my movable personal property to be left to discharge my debts, and so much of my real property to discharge the remainder of my debts, if any wanting, and the remainder of my property of what nature soever, during her widowhood. I give and bequeath to my daughter Caty the one equal fifth part of the remainder, and the rest to my two sons John and George, equal, share and share alike."

His widow in about a year after his death married Abraham Van Houten, who died in 1825. She died in 1863. By her will she directed her executors to sell and convey a lot of land, called "The Peace and Plenty Lot" (it is a part of the nine-acre lot and lies in what is now the city of Paterson), and divide the proceeds of the sale as follows: One-third to the complainant, her daughter, another third to George Post, her son, and the remaining third to Adrian Post and Elizabeth Hall, her grandchildren, children of her deceased son, John A. Post. Although a period of over twenty years has elapsed since her death, the executors have not sold that property. She had possession of it from the death of Adrian I. Post until her own death—over forty years—and she held it about forty years after she married Van Houten. Since her death her executors have had possession of the property, and have paid the taxes on it. The complainant is the daughter of Adrian I. Post. She is the person called his daughter Caty in his will. Adrian Post, one of the before-mentioned grandchildren of Adrian I. Post, conveyed to her, January 19th, 1869, all his interest in the lot, and in the pro-

Van Houten v. Post.

ceeds of sale thereof, under Rachel Van Houten's will. His wife did not join in the deed. John A. Post (son of Adrian I. Post) and his wife, by deed dated September 3d, 1829, conveyed to George Post all their undivided estate, right, title and interest in and to the real estate of Adrian I. Post, and George Post and his wife, by deed dated July 19th, 1830, conveyed that estate, right, title and interest to his mother, Rachel Van Houten. George Post gave a deed dated February 12th, 1876, to William H. Post, purporting to convey the undivided two-fifths of the plot in question. The bill is filed to compel the executors of Rachel Van Houten to execute the power of sale given to them by her will in reference to the property, and for other alternative relief, viz., a partition of the land or a sale under the direction of this court and the division of the proceeds. It also prays that the rights of the parties in the premises may be determined and settled. The controversy between the parties is as to their interests in the property; the complainant insisting that, under the will of her father, her mother took a fee in the lot, and George and William H. Post, on the other hand, contending that she took only an estate *durante viduitate*, which terminated in 1823, or thereabouts, on her marriage to Abraham Van Houten. If she had no estate, except one for her widowhood, under the will of her husband, and obtained no title by adverse possession, or otherwise, then no title or interest in the property passed by her will. It has already been stated that she had possession of the lot under claim of absolute ownership for nearly forty years after her remarriage. Her claim seems to have been acquiesced in, and does not appear to have ever been questioned. And after her death her executors took possession of the property as part of her estate, and have kept it ever since—a period of about twenty years, and it does not appear that their right to do so was ever questioned. It seems quite clear that she took a fee in the property under Mr. Post's will. The first gift in that instrument is of this lot to her, and it is followed by a gift to her of all his movable personal property, out of which he provides that his debts shall be paid, but if it should prove insufficient, then he directs that so much of his real property, as may be necessary for

Woolley v. Osborne.

the purpose, be applied to make up the deficiency. He then gives to his wife, to whom he had already given the lot, the remainder (rest or residue) of his property, of whatever nature, for her widowhood, and then gives to his daughter, the complainant, one-fifth, and to each of his sons, George and John A., two-fifths of that remainder (or rest or residue), subject of course to his wife's estate therein for widowhood. He had other real property besides the lot in question—his farm of about thirty-two and one-half acres and a lot of about ten and one-half acres. Had he intended to give his wife the nine-acre lot for her widowhood only, he would not have mentioned it specially. It was by no means the most important part of his real estate. He not only makes particular mention of it, but describes it so as to identify it positively. The gift of that lot is unqualified, while the gift of the "remainder" is only for her widowhood. It is argued that he may have intended to give her this property with his movables merely in trust for the payment of his debts. The language of the will, will not admit of that construction.

The complainant is entitled to have the power executed.

THOMAS R. WOOLLEY, assignee &c.,

v.

EZRA A. OSBORNE, receiver &c., et al.

A landlord, by a mere oral agreement, rented a hotel to a tenant, in 1867, with a stipulation that if he should enlarge the hotel the tenant would pay him a specified additional rent, and that the tenant should also have the privilege of purchasing the premises at cost. The tenant entered and occupied the demised lands, and the landlord and tenant both made valuable additions thereto. The landlord died in 1876, and the tenant in 1879. Pending litigation in another state over the landlord's will, the defendant was appointed by this court a receiver of the premises; and a few months prior to the tenant's death, he (the tenant) made an assignment to the complainant for the benefit of his creditors. On a bill alleging these facts, and that the estate of the landlord is indebted to complainant for board &c. furnished the landlord and his

Woolley v. Osborne.

family, and that the accounts between the parties are complicated, and the items numerous—*Held*, (1) that this court would entertain jurisdiction of the matter; (2) that the statute of limitations, under the circumstances, was not a defence on the part of the landlord or his representatives; (3) that the cost of improvements to the premises, made by the tenant, could not be included in this accounting.

Bill for account &c. On final hearing on pleadings and proofs.

Mr. C. Robbins, for complainant.

Mr. W. H. Vredenburg, for defendants.

THE CHANCELLOR.

The bill is filed by an assignee under the assignment act, for an account and for an injunction to stay the proceedings of a receiver appointed by this court, of the estate of the landlord (Samuel Down) of the assignor (James Jenkinson), to recover, by distress, \$1,529.22, a year's rent admitted by the tenant to be due November 15th, 1878, for the premises formerly known as Jenkinson's Hotel, at the highlands of Navesink. The injunction, which was granted on the filing of the bill, appears to have been disposed of in some way, so that the proceedings in distress were carried to sale. By reason, however, of prior mortgage encumbrances on the property on which the distress was levied, nothing was realized on the claim for rent. Both the landlord and tenant are now dead. The former died October 2d, 1876 (the bill was filed January 16th, 1879), and the latter, April 1st, 1879. The defendants are the receiver, the widow and children of Down, the only child of a deceased daughter of his, and the executors of his will. The bill states that in the fall of 1867 Down bought the property, and let Jenkinson into possession of it, under an agreement (merely oral) to keep it as a hotel; that the latter was to have it for the first year free of rent, and for the subsequent years was to pay, as rent, a sum equal to seven per centum of the price, \$11,846, paid by Down; that if Down should enlarge or add to the hotel,

Woolley v. Osborne.

Jenkinson was to pay, as additional rent, an amount equal to the interest on the cost of the enlargement or addition, and that Down was to convey the property to Jenkinson on receiving payment of, or security for, the amount which it had cost him, including the cost of any enlargement or addition. It also states that the hotel was enlarged in 1872, at a cost of \$9,000 or \$10,000, so that the rent, which before the enlargement was \$829.22 per annum, became \$1,529.22; that Jenkinson took possession shortly before April 1st, 1868, and occupied the property from that time forward up to the time of beginning this suit; that with a view of becoming the owner under the agreement, he, with the knowledge and consent and approval of Down, and at his request, either express or implied, made large repairs and improvements upon the property at his own trouble and expense; that he paid to Down, at different times, large sums of money, over and above the rent due, and that during the tenancy Down became indebted to him in a large amount for board, lodging and accommodation furnished him and others at his request, and for goods, wares and merchandise sold and delivered to him, and for the hire of horses and carriages &c. &c.; a bill of the particulars of his account whereof is annexed to the bill, showing a balance due him from Down's estate at the time of Down's death, October 2d, 1876, of \$13,451.15. The bill further states that the account was allowed to run, and the moneys over and above the rent paid on the understanding on Jenkinson's part that the agreement for sale of the property to him would be carried out, and that the large balance due him from Down would be credited on the price he was to pay; that the executors and heirs-at-law of Down have some considerable accounts against Jenkinson, which should be settled between them and the complainant as Jenkinson's assignee; that no settlement of the accounts between Jenkinson and Down, or his estate was ever made; that the accounts are of an intricate and difficult character, and of such a nature as to be unfit for settlement and liquidation in a court of law, and that the settlement thereof in such courts would tend to produce unnecessary litigation and a multiplicity of suits, and therefore a delay of justice.

Woolley v. Osborne.

The bill also alleges that Jenkinson, after the decease of Down, made considerable repairs and improvements (at a cost of \$1,251.64) on the property, which were necessary and proper to render it fit for use; that the making of those repairs and improvements was afterwards brought to the notice of the receiver, and that they were allowed and assented to by him, of which allowance and assent a paper dated November 1st, 1878, is the proof, and the complainant submits that the cost of those repairs and improvements should enter into the account. The paper to which he refers is a written acknowledgment of indebtedness for rent for the years ending respectively April 1st, 1878, and April 1st, 1879, given by Jenkinson to the receiver (but it is dated November 15th, 1878), in which the former claimed and made a deduction of \$1,251.64 from the rent, \$3,058.44, for repairs made by him to the property in the two years.

As will have been seen, the suit is brought by an assignee (the assignor is now dead) against the receiver of the estate of Down, and Down's heirs and next of kin and executors. The receiver was appointed to take care of Down's property here, pending litigation in New York as to admitting his will to probate. The defendants plead the statute of limitations, and by answer deny the execution of the agreement for sale; they deny, also, that there is any indebtedness from the estate of Down to that of Jenkinson, but claim that on the other hand the latter is indebted to the former in a large sum of money. The evidence establishes the fact that Jenkinson occupied the property under the arrangement stated in the bill. The question to be decided on this hearing is whether there should be an account or not. There have been mutual dealings between Down and Jenkinson, in which credit has been given on both sides. For years Down was entitled to rent from Jenkinson, but what amount exactly does not appear, and during the whole period he was contracting debts with Jenkinson, to the payment of which the rent was applicable. They never had any settlement. The items of Jenkinson's account are very numerous. The parties to this suit are, as before stated, acting in a representative capacity. In *O'Connor v. Spaight*, 1 Sch. & Lef. 305, Lord Redesdale retained

Woolley v. Osborne.

jurisdiction of such a suit, under similar circumstances. See, also, *Porter v. Spencer, 2 Johns. Ch. 169*. In instituting this suit recourse was had to this court by the assignee, under circumstances (in the light of the statements of the bill) justifying such resort to equity. No suit at law was pending in which the rights of the parties could be ascertained. The defendants have not demurred, but have pleaded and answered, and the parties have taken a very large amount of testimony on the subject of the account. It is proper that the account should be taken. The defendants insist that on an examination of the facts in the case, and scrutinizing the accounts, it will appear that nothing is due the complainant, and a statement purporting to be a general statement of accounts between them up to August 1st, 1868, made by Jenkinson, is much relied upon by the defendants, as showing what the state of the accounts was at that date. It evidently is not a complete statement of the accounts between them. It appears to be merely a statement of cash received (\$2,706.79) by Jenkinson from Down, from December 18th, 1867, and of the expenditure of \$2,696.39 thereof by him for Down for work and materials, leaving an unexpended balance of \$10.40. The statement also embraces a further sum of \$269.05, which Jenkinson claimed to have spent for Down for labor and materials (including certain fixtures in the hotel), and board for mechanics employed on Down's work; to the payment of which are applied the before-mentioned balance of \$10.40, and \$274 cash received by Jenkinson from Down for filling ice-houses (for crediting which latter sum there Jenkinson gives special reason), leaving a balance of \$15.35 due Down on that account. It includes no credit for rent, nor any charge for board. It is also urged that the before-mentioned acknowledgment of the amount due for rent for 1878 and 1879 is strong evidence, also, that nothing is due to the complainant. But that instrument contains a provision that it is to be without prejudice to claims against Down's estate for time prior to those years. Apart from these considerations, it is quite enough to say that it is no part of the duty of this court to take the account on this hearing.

Woolley v. Osborne.

In taking the account no credit is to be given to the estate of Jenkinson for any repairs or improvements put by him upon the property, whether before or after the death of Down. Although he took possession as a tenant under an agreement which fixed the rent at the amount of the interest on the cost of the property to the owner, and he expected to buy the property, he was nevertheless merely a tenant. He therefore cannot recover for any improvements put on the property, nor for any repairs. There is no evidence to charge Down's estate with the cost of either. The fact that Down was there and witnessed the making of repairs or improvements, is not enough under the circumstances to raise an implication of a promise to pay for them, or to charge his estate with their cost. Of course Down's estate is liable to pay for any work or materials done or furnished at his request; but it is not liable for any kind of repairs or improvements to the hotel property, however permanent or extensive, done or made by Jenkinson in the expectation that he would, some day, become the owner of the property, and without the order or direction of Down, or his promise, express or implied, to repay him therefor. Nor will the fact that Jenkinson, in the paper given by him to the receiver as an admission of the amount of rent due, made a deduction, and so claimed an allowance for repairs made after Down's death, in any way bind Down's estate to pay for those repairs. That paper as to that matter is merely evidence of a claim on the part of Jenkinson. It in fact and by its terms is only an admission on his part that, after deducting \$1,251.64 for repairs, there is due the sum of \$1,806.80 for the two years 1868 and 1869. It is the statement in the form of a due-bill of the amount which he was willing to admit he owed for the rent of those two years. The acceptance of it by the receiver under the circumstances would not bar the estate from claiming more than that balance, or bind it to allow for those repairs.

The demands are not subject to the operation of the statute of limitations. On the one hand, there are numerous charges up to August 27th, 1878, and while on the other there is indeed, after 1868, only the demand for rent, the credit of the rent by Jenk-

Field v. West Orange.

inson from year to year was evidently in pursuance of an agreement between him and Down that the rent should be offset against Jenkinson's claims against Down, and Down appears to have acquiesced in such credit. The crediting of it, therefore, must be regarded as an annual payment on account, to be applied if, and so far as necessary, to the payment of Jenkinson's demands. Here were mutual accounts, mutual credits founded on subsisting debts on the other side, and an implied agreement, at least, for a set-off of such mutual debts.

JAMES W. FIELD

v.

THE INHABITANTS OF THE TOWNSHIP OF WEST ORANGE.

Where a sale of lands under a municipal assessment is absolutely void, because made after the time limited by law for the continuance of the lien of the assessment on the premises, this court has no authority, on a bill *quia timet*, to order the complainant to pay the assessment; neither can it correct it nor declare it a lien on the premises, under the statute providing that such assessments shall not be set aside for irregularities or defects in form &c.

Bill to quiet title. On final hearing on bill, answer and replication.

Mr. J. W. Field, in pro. pers.

Mr. J. W. Taylor, for defendants.

THE CHANCELLOR.

This suit is brought for relief against an assessment of tax of 1879 on land described in the bill, and a sale for the tax thereunder. The complainant prays that his title to the property may be settled, and the assessment and sale under it adjudged

Field v. West Orange.

and decided to be illegal and void. The suit is brought under the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." *Rev. p. 1189*. It is admitted that the sale took place after the expiration of the time limited by law for the continuance of the lien. The sale was therefore *ultra vires* and a nullity. *Johnson v. Van Horn, 16 Vr. 136*. The case is, on this head, within the decision in *Lembeck v. Jersey City, 4 Stew. Eq. 255*; *Field v. West Orange, 10 Stew. Eq. 434*. The complainant is in possession of the land, and can in this way only put the claim under the tax deed in a course of adjudication.

The defendants, by their answer by way of cross-bill, pray that the court will, if the tax or assessment was illegal, or the proceedings for assessing or collecting it were not in conformity to law, ascertain and determine for what sum the land was legally liable to taxation in the year for which the tax was assessed, and fix the amount. It is urged that the provisions of the "general act respecting taxes, assessments and water rates" (*P. L. of 1881 p. 194*) extend to such cases as this, and will warrant the court in making a decree that the complainant pay such tax as ought to have been assessed upon him in respect of the land for 1879. That act provides that no tax, assessment or water rate shall be set aside or reversed in any court of law or equity in any action, suit or proceeding, for any irregularity or defect in form &c., but that the court in which the action, suit or proceeding shall be brought to recover the taxes, assessment or rate, shall be required to amend all irregularities, errors or defects, and, if necessary, shall ascertain, and, by order or decree, fix the amount of such tax, assessment or rate; and that the amount so fixed shall remain a first lien or charge on the property, and shall be collectible as provided by law, the same as it would have been if properly levied or assessed in the first instance. The provisions of that act would be applicable to that part of the bill which seeks to review and set aside the assessment for irregularity, but this court has no jurisdiction in that matter. *Jewell v. West Orange, 9 Stew. Eq. 403*. The sole ground of jurisdiction is the removal

Watson v. Jeffrey.

of the cloud of the tax-deed from the title, and to that the act just referred to does not apply. The complainant is entitled to a decree declaring that the tax-deed conveyed no title or interest in or to his land, and is void.

JAMES MADISON WATSON

v.

ROSA VERTUER JEFFREY et al.

Complainants and those under whom they claimed had had fifty years' open, notorious and continuous possession of lands, under duly recorded deeds purporting to convey the entire estate therein.—*Held*, that their title was valid, as against one claiming under the former owner of an undivided interest.

Bills to quiet title. On final hearing on pleadings and proofs.

Mr. W. P. Wilson, for complainant.

Mr. W. C. Spencer, for answering defendants.

THE CHANCELLOR.

These bills are filed under the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." *Rev. p. 1189*. The premises in question are a tract of about sixty-four and a half acres, in the city of Elizabeth. They were conveyed to James Madison Watson and Inslee A. Hopper (now deceased) by George Peabody Wetmore and wife, August 14th, 1871. Messrs. Watson and Hopper, with their wives, conveyed an undivided third of the property to William V. V. Lidgerwood, March 5th, 1873; and afterwards, but on the same day, Messrs. Hopper and Lidgerwood and their wives conveyed to Mr. Watson all their interest in part thereof, a lot of one hundred feet in width by two hundred

Watson v. Jeffrey.

and fifty feet in length. To clear the title of that lot, the first suit above stated is brought, and to remove the same cloud from the title of the rest of the property the other suit was instituted. The cases were heard together. George Peabody Wetmore derived his title to the property under the will of his brother, William S. Wetmore, deceased, dated October 21st, 1861, proved in New York, June 28th, 1862, and recorded in the surrogate's office of Union county, in this state, September 6th, 1862. The property was conveyed to William S. Wetmore, by Ralph H. Isham and wife, November 26th, 1855, by deed recorded April 12th, 1856. Isham obtained title by two deeds dated June 1st, 1855, and recorded April 12th, 1856, one from the children of Oliver Pierce, deceased, and the husband of a deceased daughter of his, and the other from the special guardian (in this court) of the infant child of that daughter. Pierce, who owned the property from about 1830 to the time of his death, appears to have had for his documentary title three deeds, one from David Austin, executor &c. of Moses Austin, deceased (Pierce's father-in-law), dated April 1st, 1830; another, a release of dower from the widow of Moses Austin, deceased, dated July 16th, 1834, both recorded January 29th, 1835, and the third, a deed from William B. Bend and wife to him for a lot of three and a half acres of land, dated July 7th, 1844, and recorded July 18th, 1851. Pierce and those claiming under him have had possession of the whole of the property for over fifty years.

The title set up in the answer is to an equal undivided one-eighth part of the tract of about three and a half acres just mentioned, which is part of the before-mentioned tract of sixty-four and a half acres. The title of the complainant in all respects, except as to the claim of the answering defendants, is admitted to be good. The lot owned by the complainant, Watson, in severalty is part of the-three-and-a-half-acre tract. In the suit by Watson alone, the answering defendants claim an undivided eighth part of the lot which he claims to own in severalty, and in the other suit they claim an undivided eighth part of all of the lot of three and a half acres, except that part of it which is claimed by him in severalty, which, as just stated, is the subject

Watson v. Jeffrey.

of his suit. They claim that Cornelius J. Hetfield very many years ago died seized of the tract of three and a half acres, and that on his death it descended to his two sisters Abby and Mary; that on the death of Abby, under whom those defendants claim title, her half descended to her children, John T. Griffith, Susan, wife of Richard S. Cox, William B. Griffith and Mary Preto y Neto. Richard S. Cox and his two daughters (his wife was then dead), with the husband of that one of them who was married, Mary Preto y Neto and her husband and John J. Griffith executed and delivered a deed, dated August, 1843, and recorded in July, 1844, to William B. Bend, purporting to convey the property in entirety to him in fee, and he executed and delivered a deed for it, as before mentioned, to Pierce. The answering defendants claim under William B. Griffith, who did not join in the deed to Bend. Bend, at the date of his conveyance to Pierce, appears to have had a power of attorney (sealed with a scroll seal, and not duly acknowledged, and never recorded), from the guardian of the person and estate of William E. T. Griffith, the infant son of William B. Griffith (who had died leaving but that one child surviving), which purported to authorize him to release that interest. It is possible that he supposed that he was authorized to convey the interest, and intended to do so accordingly by the deed to Pierce. But that is a matter of no importance in the decision of this controversy. It may, however, be remarked in passing, that for various obvious reasons no valid power to convey the infant's land was given by that instrument. William E. T. Griffith died in 1851 or 1852 or 1853, over thirty years ago, and as before stated, Pierce and those claiming under him have had possession of the property as owners under claim of ownership for over fifty years. Mr. Spinning testifies that Pierce bought the property about 1830, and that from the time he purchased it to the time of his death, he had possession of it continuously. He says he has known the property since 1830, and it has been fenced in ever since that time. He further says that he knew the premises for a year or two before 1830, and they were fenced in even then. Mr. Fay testifies that he has known the property

Watson v. Jeffrey.

since 1845, and that it was in possession of Pierce, who, either himself or by his tenants, cultivated it as a farm. The proof is plenary, and there is no attempt to gainsay it, that Pierce and those claiming under him have, for about half a century, had open and notorious possession of the whole of the property under claim of full ownership. On the other hand, there is no proof that any of those under whom the answering defendants claim, ever at any time had any possession of the premises or any part thereof.

It is urged, however, that Pierce, by the conveyance from Bend to him, became a tenant in common with William E. T. Griffith. But the deed to Bend from Coxe and others purported to convey not an interest or interests less than the whole, but the whole of the tract in entirety. Bend, by his deed to Pierce in June, 1844, also conveyed the whole of the tract in entirety, and did it by deed with covenants against encumbrances or limitation of right to convey, covenant of ownership and covenant of warranty-general. The deed to Bend was recorded in 1844, and that from him to Pierce in July, 1851, over thirty years ago. These conveyances, especially the latter, were an assertion of sole ownership of the property in entirety by the grantors, who thereby assumed so to convey it, and the recording of the deeds was notice to all concerned of such claim of ownership. Entry by Pierce under those deeds was evincive of his intention to claim the whole to the exclusion of the other co-tenant, and the deeds having been duly recorded, the transaction acquired the notoriety of livery of seizin, and was a disseizin of such co-tenant; and Pierce and those claiming under him having held possession continuously for the period of twenty years by open and notorious acts of ownership without any interference on the part of such co-tenant or anyone claiming under him, title by adverse possession was acquired. *Foulke v. Bond*, 12 Vr. 527. William E. T. Griffith appears, but not by any direct or competent proof, to have been an infant at the date of the deed from Bend to Pierce. When he became of age does not appear. But he died, as before stated, in 1851 or 1852 or 1853, more than twenty (about thirty) years before the commencement of

Hill v. Millville Insurance Co.

this suit. It will be decreed that the defendants have not, nor has any of them, any estate, right, title or interest in or to the complainants' land to clear the title to which the suits are brought, or any part of it, and that the complainants' title, so far as relates to any claim to any estate, right, title or interest on the part of the defendants, or any of them, be settled and established. It will also be decreed that the answering defendants pay the costs of this suit.

ALLAN A. HILL

v.

THE MILLVILLE MUTUAL MARINE AND FIRE INSURANCE
COMPANY.

A policy of insurance issued in the name of the agent of the owner of the vessel insured, instead of in the name of the principal, through the mistake of the insurance company's agent in preparing the application for the policy, without any representation or mistake of the owner or applicant for such insurance, may be rectified after the loss of the vessel, the act of the company's agent in such case being that of the company and not of the insured, notwithstanding the fact that he signed the application with his own name "for applicant."

Bill to reform policy of insurance. On final hearing on pleadings and proofs.

Mr. W. B. Williams, for complainant.

Mr. J. H. Nixon, for defendant.

THE CHANCELLOR.

This suit is brought to reform a policy of marine insurance for \$2,000, dated November 8th, 1879, and continuing for one year from that date, issued by the defendant in favor of the firm of P. I. Nevius & Son, upon the brig Euroclydon. The vessel was

Hill v. Millville Insurance Co.

not owned by the firm, but by the complainant, who was a resident of Nova Scotia, and whose agents for the purpose of obtaining the insurance P. I. Nevius & Son were. There had been two previous policies issued by the defendant on the same vessel, each for one year—one in 1877 and the other in 1878. The latter expired on the 8th of November, 1879. The first was issued in favor of P. I. Nevius & Son, but whether it appeared on its face to be for the benefit of the complainant or not the evidence does not clearly disclose. The second also was originally issued in the name of P. I. Nevius & Son, but afterwards was changed to that of the complainant as the result of an inquiry on the part of the defendant of the agent, Daniel D. Baker, through whom the insurance was ordered, as to why the firm had insured in its own name if it was not the owner of the brig. That policy, therefore, was in the name of the complainant when it expired. The application in pursuance of which the third policy, the one in question, was issued, was made by P. I. Nevius & Son to the same agent. The firm applied to him in New York, where his office was, to renew the then-existing policy, which, as before stated, was in favor of the complainant. The written application was made out by the agent on a blank furnished by the defendant to him; such as was furnished by it to all those who obtained business for it. It stated that insurance was "wanted on the brig by P. I. Nevius & Son," and it was signed by Daniel D. Baker, "for applicant," the word "applicant" being printed in the blank. The vessel was lost near Montevideo in July, 1880, during the continuance of the policy. Proofs were made and delivered to the company, through Baker, but the company refused to pay, on the ground that P. I. Nevius & Son were not the owners of the vessel when the policy was issued. As before stated, the second policy, which ran for one year from November 8th, 1878, that is, to November 8th, 1879, was in the name of the complainant. It had been obtained by P. I. Nevius & Son, for him, through Baker, as agent for the defendant. Shortly before the first policy expired, the defendant's secretary wrote to Baker, and mentioning the fact that the policy would soon expire, said the company did not know about renewing it,

Hill v. Millville Insurance Co.

and asked whether the vessel was in good order and whether P. I. Nevius & Son owned her, to which Baker replied by letter of November 22d, 1878, that Nevius said she belonged to a business friend of his, and that in consequence of the business relations between him and them, P. I. Nevius & Son kept that insurance on her. That letter was received by the company. But notwithstanding the fact that P. I. Nevius & Son said they did not own the brig, it issued the policy to them and sent it to Baker, enclosed in or with a letter in which the secretary asked why P. I. Nevius & Son insured the vessel in their own name if they did not own her, and added that the company was not willing to issue the policy except in the name of the owner. That policy was canceled, and another, in the name of the complainant, issued instead thereof, as before stated. It appears, from the evidence, that before the application for the last policy was made, the company itself had taken notice of the fact that the then-existing policy (to the complainant) was about to expire, and the secretary had written to Baker on the subject. By letter of October 22d, 1879 (the policy then in force did not expire until the 8th of November, and no application for its renewal had been made), the secretary informed Baker that that policy would expire on the 8th of November, and that before renewing it the company must have a full report of the situation of the vessel. Baker promised, by letter of October 25th, 1879, to attend to the matter. The complainant, by letter of November 19th, 1879, directed P. I. Nevius & Son to renew the policy for him. In compliance with that direction they sent a clerk of theirs, Mr. McIntosh, to Baker, as agent for the company, to obtain the renewal. He took with him the policy which had expired on the 8th, and gave it to Baker for renewal. The latter at once said (undoubtedly referring to the communication he had received on the subject from the company by the above-mentioned letter of October 22d) he would have to have the full particulars of the vessel as to her repairs &c. before he could do anything with it. Mr. McIntosh immediately wrote to the complainant for the required information. Owing to his absence from home, the complainant did not reply until December 3d. The information

Hill v. Millville Insurance Co.

he then gave was not satisfactory to Baker (he said it was not sufficiently explicit), and Mr. McIntosh again wrote for P. I. Nevius & Son to the complainant for a copy of the vessel's class. The complainant replied, December 15th, that the vessel had been reclassified in Baltimore, and that he had requested a Mr. Hays of that city to send them the needed copy. They obtained it from Hays and gave it to Baker. A short time afterwards he obtained the policy and delivered it to P. I. Nevius & Son, who took it and put it away in their safe, without particular examination, and never discovered that it was not issued to the complainant or was issued to them, until after the proof of loss had been made, and the company refused to pay on the ground that the policy was issued to P. I. Nevius & Son, who did not own the vessel. Nevius & Son made no written application for the policy in question. They merely applied for a renewal of the policy of 1878, which they then handed to the agent. No written application was made at all until the 23d of December, when Baker himself made it, as before stated, on one of the blanks furnished him by the company for such purposes. He had not been requested by P. I. Nevius & Son to renew or insure in their name. They had not told him, or given him to understand, that the complainant was no longer the owner of the vessel, nor that they had become the owners, nor that they had any interest whatever in it; they merely applied for a renewal of the policy of 1878 which had been issued to the complainant, and gave him that policy for his guidance and as part of his instructions. Indeed, the request for a renewal and the delivery of the policy which had expired, constituted the application on their part. It does not appear that they understood that Baker intended to make the written application. They did not request him to do so; but after he had obtained the copy of the class, he, without consultation with them, and without their knowledge, made the application, signing it "Daniel D. Baker, for applicant." He says the insertion of the name P. I. Nevius & Son was, he supposes, a mistake of his; that Mr. McIntosh came to his office and wanted the policy renewed, and as he, Baker, had frequently made out policies for

Hill v. Millville Insurance Co.

P. I. Nevius & Son, he made this one out in that way. He says he supposes it was a blunder of his, and he adds that he did not discover it until after the loss. He knew the application was for a renewal; the word "renewal" is written in the usual place—a conspicuous one—at the top of the application, and is under-scored to call attention to it. Moreover, on the same day on which the application is dated, Baker wrote to the company, enclosing the application, and speaking of it as an application for "renewal" of the policy on the Euroclydon. He added:

"You will recollect you informed me that her class had expired, and that unless she had been reclassified you could not renew it. I so informed Mr. Nevius. He replied that he would write to the managing owner and find out about it. He did so, but received no reply until recently, as the managing owner was absent from home" &c.

The company knew it was an application for a renewal of the policy which had been issued to the complainant. It is urged on behalf of the company that by the reference to the managing owner in Baker's letter, the company was led to believe that P. I. Nevius & Son were part owners. That reference was not such a representation. The company, knowing, as it did, that P. I. Nevius & Son were ship-brokers, and that when the policy to be renewed was issued they were merely agents for the complainant in obtaining insurance on his vessel, was not warranted in assuming from that reference that the firm were themselves part owners. The term "managing owner," it may be observed, is one which ship-brokers would be very likely to use in connection with a request for information as to a vessel, without reference to whether she was owned by one or more persons. Baker, in his letter, probably intended to give the substance of the conversation with Nevius and not his exact words. The conversation was not in reference to the ownership of the vessel at all, but as to her condition, and Baker would probably have used the same language if Nevius had told him they would apply to the person who was the sole owner, who, of course, would have been the managing owner. It is noteworthy, in this connection, that Mr. Nevius swears that before the policy of 1878 expired, Baker

Hill v. Millville Insurance Co.

called on him and stated that the company would not renew the policy without having knowledge of the repairs which had been made, and whether the vessel had been reclassified, and he says he thinks he stated to him at that time that he had received no orders to renew the policy. Baker certainly understood that P. I. Nevius & Son were merely agents for the owner, and not owners or part owners themselves. Baker was the agent of the company and not the agent of the complainant, and the latter is not bound or to be affected by his errors or unauthorized misstatements. The fact that Baker signed the written application "for the applicant" did not make him the agent of the complainant, or render him any the less the agent of the company. It is true, Mr. Howell, the secretary, swears that the officers of the company, before taking the risk, wrote several letters asking if P. I. Nevius & Son were owners, and that the replies thereto were that the complainant was managing owner and they part owners, and that the company was insuring the interest of the latter, but he does not speak of his own knowledge, and the statement is entirely unsupported and is clearly erroneous. All the evidence shows that no question was asked or suggested as to the ownership at all. The same witness also says that the application for the second policy was in the name of the complainant. This is a mistake. It was in the name of P. I. Nevius & Son, and was made and signed by Baker. It should be stated that Mr. Mulford, the person who was secretary during all these transactions, is dead. Mr. Howell became secretary in June, 1880.

The defendant denies that Baker was its agent. It alleges that it had no recognized agent in the city of New York, and was, by the laws of the State of New York, prohibited from having any there, because it was a mutual company. The latter fact is of no importance in this suit. If, in fact, Baker was its agent, it is manifestly of no consequence that the law of New York prohibited the defendant from having an agency there. The fact that the defendant violated the law of New York in that respect would not excuse it from liability. Baker might have been its agent to bind it, notwithstanding the prohibition. As it construed the law, it was at liberty to do business in New York by

Hill v. Millville Insurance Co.

special agents, and its idea seems to have been that it might lawfully act in its business there through persons in New York as its agents, notwithstanding the law, provided such persons did not publicly, by signs or otherwise, claim to be its agents. That Baker was its agent (and with a very extensive field of action) there is no room to doubt. P. I. Nevius & Son understood that he was its agent, not only from his acts as agent in behalf of, and as representing it, but also from what he said on the subject. Mr. Nevius says he thinks Baker told him he was agent for the company. Baker testifies that he did business in respect to insurance by the company from about the year 1873 to 1879. The secretary says that Baker did business with them from 1874 to about the first part of 1880, when the company got into difficulty, and, as he expresses it, closed up writing on any of Baker's business for a period of about six months—from June 1st, 1880, to the first part of 1881. He also says that Baker is doing business for the company still, but that appears from Baker's testimony to be a mistake. He says he has not done any business for the company since it got into trouble. Baker, when asked to state the different kinds of business which he transacted for the company, at its request, during the period he named as above mentioned, from 1873 to 1879, said they were hull risks, freights and cargoes; that when there was a wreck, or a vessel was injured in any way, he attended to the business for the company and arranged the business of the loss &c.; that he made certain kinds of risks binding on the company; that he sometimes received directions from it to insert certain clauses in the policies; he initiated risks on open policies, whether of insurance to individuals or re-insurance to companies; as agent for the company, he received and receipted for premiums and accounted for them by monthly accounts to it; he sometimes examined vessels for it as to their condition and class, and it consulted with him generally in reference to all matters, such as averages, collections &c. to be done, learned or attended to in the city of New York touching its marine insurance, not only so far as those were concerned which it had taken through his instrumentality, but occasionally also as to others. He made some adjustments,

Hill v. Millville Insurance Co.

settling some losses and claims for the company. By an understanding between them he gave what are called "dummy notes" for some insurances obtained through him; that is, he gave, instead of the premium notes of the assured, notes signed by him for them, for which genuine notes were to be subsequently substituted. He represented himself to be the company's agent. He so signed the special clauses inserted by him in policies. He receipted for premiums as its agent. He initiated risks for it in that way. In two instances he endorsed and collected the money upon bank checks for premiums given to him by P. I. Nevius & Son, and made payable to him as agent of the company. His monthly accounts current with the company were on printed blanks furnished by it to him for the purpose. They were headed, "Dan'l D. Baker, agent at New York, in account with Millville Mutual Marine and Fire Insurance Company, for the month ending" &c. The blanks contained the following printed memorandum or notice:

"This statement to be forwarded on the last business day of each month, and in all cases accompanied with canceled policies, vouchers for charges and remittances in full of balance due."

In 1877, he addressed a letter to Messrs. Bentley, Gildersleeve & Co., informing them that the schooner *Early Bird* was in the port of New York, and appeared to be neglected by the assured, and that the company would not hold itself liable for any damage or expense accruing to her or her freight in consequence of such neglect &c. This letter he signed "Millville Mutual M. & F. Ins. Co., by Dan'l D. Baker, agt.," and he appears to have sent a copy of the letter to the company at once. As before stated, he had authority to initial open policies, whether for insurance or re-insurance. He had initialed such a policy for insurance for P. I. Nevius & Son. Mr. Nevius says they took out such a policy from the company, and Baker represented himself as its agent, and gave them a book in which the risks were to be entered.

In reference to such policies, the secretary says an open policy is a policy made by the company and attached to the front part

Hill v. Millville Insurance Co.

of what is called an open policy-book, in which a given amount of insurance, that is, insurance up to a certain amount, is allowed the parties holding the book. All that is necessary to make that policy binding on any particular vessel is to enter on that policy-book, at the time the risk commences, the name of the vessel, with the valuation and voyage, and the amount of insurance the insured wants the company to cover, and he says that is binding on the company, according to the agreement; that a correspondent authorized to do so, would, not only with a view to his own commissions, but also to the protection of the company, examine the book from day to day to see what amount the assured were putting upon it, and would initial the entries already made. By initialing is meant signing the initials of the agent's name, with the addition "agent" or "agt.," denoting his representative character. It is quite clear that P. I. Nevius & Son had reason to regard Baker as the agent of the company. But still further, Baker swears that there was a verbal understanding between him and the company that he was to act as its agent so long as it was prohibited from having an agency in the state of New York. He further says that he had seven or eight books for open policies, before the policy in question was issued. He was the agent of the company not only to receive applications for insurance and premiums, but for many other important purposes, and was, in fact, its general agent in the city of New York. Being the company's agent, his mistake in the application in question was the mistake of the company as much as it would have been if the application had been made in the company's office and taken down by its secretary, and the blunder had been made by the latter. The complainant, by his agents, applied to the company to renew his policy, and the company, by its own mistake alone, issued the new policy in the name of his agents. It did not renew, but issued a new policy. In *2 Am. Lead. Cas. (5th ed.) 919, note*, it is said that whatever the rule may be, under ordinary circumstances, it would seem clear that when the duty of preparing the policy is, as generally happens, assumed by the assurers, they cannot take advantage of the failure of the instrument to express any fact or circumstance that has been duly

Hill v. Millville Insurance Co.

communicated by the insured and omitted, through negligence or design, by their officers or agents, and that the principle is the same where the error or misdescription occurs in an application or survey, which, though nominally proceeding from the insured, is in fact prepared or dictated by an agent of the company. The cases cited as authority fully sustain the authors in this conclusion. Among them are, notably, *Plumb v. Cataraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Howard Ins. Co. v. Bruner*, 23 Pa. St. 50; *Ayres v. Hartford Ins. Co.*, 17 Iowa 176, and *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465, to which may be added *Woodbury Association v. Charter Oak Ins. Co.*, 31 Conn. 517; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331, and *Parsons v. Bignold*, 13 Sim. 518. See, also, *May on Ins.* §§ 131, 144.

In the case in hand there was no fraud. P. I. Nevius & Son did not intend to take out the policy in their own name, but in the name of the complainant, and they supposed they had done so. They neither represented that they were owners nor asked for a policy in their name. That the policy was issued in their name and not in that of the complainant was due to mistake, not theirs, but the company's—a mistake of which they knew nothing until after the loss had occurred and the proofs had been made. Nor, it may be observed, was there anything in the policy, had they read it, to put them upon any inquiry as to the contents of the application. It makes no reference to the application. The fact that they did not examine it and discover the mistake, cannot affect the complainant's right to relief in this suit. Manifestly, justice requires that the company shall not be permitted to take advantage of its own mistake. The application to renew did not warrant it in issuing the policy to P. I. Nevius & Son. In *Oliver v. Mut. Marine Ins. Co.*, 2 Curt. C. C. 277, McKay, an insurance broker, applied for insurance on two ships and their freight, the policy, according to his written direction on the subject, to be for him, and to be made out on account of A. McLimont, and payable to the latter or his order. The policy was made out accordingly. There was a loss. McLimont was himself only an insurance agent, to whom the

Crammer v. Atlantic City Gas and Water Co.

complainant's agent had, through still another person, applied to get the insurance. The suit was brought to reform the policy by inserting after McLimont's name the word "agent" or the words "for whom it may concern." The rectification was decreed. The court says that when a complete contract for a policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of the principal, and in order that this contract may take effect, power is impliedly reserved to the agent specially to declare the interest upon which the insurance is to attach, and to have such declaration inserted in the policy when drawn, or to have the policy drawn so as to assure him, as agent, leaving the declaration of interest to be made. In that case the company supposed McLimont was the owner. It was led to believe so by the direction given by McKay to insure on account of McLimont. The company knew McKay was merely an agent, and the erroneous direction arose either from mistake or fraud. The court held it was the former, and ordered that the policy be corrected. See, also, *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645. But in the case under consideration there was no misrepresentation nor any mistake on the part of the complainant or his agents. The mistake was the consequence of a blunder on the part of the company's agent. There will be a decree for the reformation of the policy by the substitution of the complainant's name as assured, instead of that of P. I. Nevius & Son.

JAMES V. CRAMMER

v.

THE ATLANTIC CITY GAS AND WATER COMPANY.

Complainant filed a bill to restrain defendant from continuing a nuisance of nauseous and noisome odors from its gas works, causing injury and discomfort to him and his family, dwelling in his house opposite the defendant's works. The defendant answered, stating the origin of the company, and its

Crammer v. Atlantic City Gas and Water Co.

acts under its corporate powers, its acquisition of the land whereon its works are erected, the natural condition and the improvement of that land, the former condition of complainant's property, the great cost of constructing its works, and the irreparable injury that would result from an injunction preventing its manufacturing gas.—*Held*, on motion, that these averments were not responsive, but impertinent and irrelevant, and must be stricken out. The formal clauses required by the two hundred and fourteenth rule to be omitted from answers, having been inserted by the defendant, were also stricken out.

Bill for relief. On motion to strike out parts of answer.

Mr. J. J. Crandall, for the motion.

Messrs. Slape & Stephany, contra.

THE CHANCELLOR.

The bill is filed by James V. Crammer against the Atlantic City Gas and Water Company, to restrain it from continuing a nuisance of nauseous and noisome odors from its gas works, causing injury and discomfort to him and his family, dwelling in his house opposite to those works. The answer, amongst other things, sets forth the origin of the company and its powers, its action under those powers, its acquisition of the land on which its works are situated, the natural condition of that land, its improvement by the company, the then condition of the property now occupied by the complainant, the existence of a merely temporary nuisance from refuse matter (which it says is now abated), created by the company shortly before the bill was filed, and the fact that the bill was filed while the company was engaged in abating that nuisance. It also states that the company's works have been constructed at a great cost, and that to restrain it from manufacturing gas there would inflict great injury upon it. The complainant moves, on notice, to strike out all those statements, on the ground that they are not responsive, and are impertinent and irrelevant. The matters objected to are none of them, except the statement in regard to the existence of the temporary nuisance, and the abatement thereof, responsive to the allegations or charges of the bill, and none of them, with the exception just

Garwood v. Hartley.

mentioned, is in anywise necessary to the defence, which is that the nuisance caused by the refuse matter has been abated, and that the defendant has caused none since. All the parts of the answer mentioned in the notice, except the two sections which have reference to the nuisance from the refuse, will be stricken out, with costs.

The direction of the two hundred and fourteenth rule, that the formal clauses therein mentioned shall be omitted from answers, has not been observed. These clauses, therefore, will be stricken out of this answer.

HENRY L. GARWOOD

v.

ELIZABETH HARTLEY et al.

Two defendants in a partition suit put in separate and merely formal answers. — *Held*, that the fact that the answers were merely formal, and put in by the same solicitor, did not disentitle those defendants to the costs thereof.

Bill for partition.*Mr. Joseph H. Gaskill*, for complainant.*Mr. Jacob C. Hendrickson*, for defendants.

THE CHANCELLOR.

The decree of distribution in this case provided for the payment of the costs of the answering defendants out of the proceeds of the sale, and they were taxed and paid accordingly. Motion is now made on behalf of the complainant to amend the decree by striking out that part of it by which those costs were allowed, and for an order requiring the defendants' solicitor to

Gibbs v. Morgan.

repay the amount of those costs. The answers, apart from the formal clauses forbidden by the two hundred and fourteenth rule, for which no costs are taxed, were merely a formal submission, in a few lines, on the part of the defendants, of the subject of the suit, so far as their interests are concerned, to the decision of this court. They were merely a consent of record. The costs were properly allowed. The two defendants answered separately by the same solicitor. The answers were identically the same. The fact that they were the same, and were put in by the same solicitor, was not, under the circumstances, a reason for refusing to give costs to both. The motion is denied, with costs.

THEODORE B. GIBBS et al.

v.

ELI B. MORGAN et al.

A statute of 1876 authorized the appointment of deputy county clerks, but provided that they should receive no salaries from their respective counties. A statute of 1882 directed that in all counties where the county clerks were then paid by annual salary, the deputy clerk should receive an annual salary of \$2,000, payable quarterly. A bill was filed by some taxpayers and citizens of Camden county, alleging that the statute of 1882 was unconstitutional, and thereupon an injunction was issued, restraining the county collector from paying, and the defendant from receiving, as deputy county clerk, any salary thereunder. Pending the suit, the board of freeholders passed a resolution, appropriating \$160 per month to the defendant for his services in the county clerk's office from the time the bill was filed and injunction issued.—*Held*, that, although the board of freeholders were not parties to this suit, the payment of the money by the county collector, and its reception by the defendant, were palpable violations of the injunction.

Bill for injunction. On order to show cause why attachment should not issue.

Gibbs v. Morgan.

Mr. A. Hugg, for complainants.

Mr. C. G. Garrison, for defendants.

THE CHANCELLOR.

The complainants, taxpayers and citizens of Camden county, brought this suit, to restrain the collector of that county from paying, and the deputy clerk from receiving, any money for salary of the latter under the act of 1882, entitled "A supplement to an act entitled 'An act concerning clerks of counties in this state,'" by which it was provided that in all counties where the county clerks then were paid by annual salary, the deputy clerk should receive the sum of \$2,000 per annum, to be paid to him in quarterly payments by the collector of the county. *P. L. of 1882 p. 195.* A former act (of 1876) created the office of deputy clerk, and provided that no additional compensation should be paid to such deputy clerks by the counties. *P. L. of 1876 p. 289.* The bill attacked the law of 1882 as being unconstitutional. On the filing of the bill an injunction was ordered and issued, restraining the collector from paying, and the deputy clerk from receiving, out of the funds of the county, the salary of the latter, under the act of 1882. The writ was duly served on both. Afterwards the injunction was modified so as to permit the deputy clerk to bring an action or actions at law for his salary under the act, but continuing the restraint against paying or receiving, except upon judgment obtained in such action or actions. The injunction was served July 18th, 1884, and the order modifying it was made on the 29th of the same month. Suit was brought at law soon afterwards, but it was undefended, and a judgment was entered therein September 1st, 1884, for \$168.32, the balance (\$166.66) of salary for the quarter ending July 1st, 1884, and interest thereon, besides \$27.40 costs of suit. On the 9th of October following, the board of chosen freeholders passed a resolution "that the deputy clerk be paid the sum of \$160 per month by the county collector for his services rendered in and about the county clerk's office; said salary to commence June 1st, 1884." Under that resolution

Gibbs v. Morgan.

the collector paid to the deputy clerk, and the latter received \$640 for the salary of the latter, from June 1st to October 1st. No payment was made on account of the judgment, which, as before stated, was for salary under the act up to July 1st. Mr. Morgan, the deputy clerk, testifies that after the bill was filed he continued to devote his entire time and services to the county in and about the clerk's office, and after some months had passed he presented a bill for his services to the county; that he saw several of the chosen freeholders, and told them that he was barred by an injunction from claiming or collecting any salary as deputy clerk under the act of 1882, and that it rested with them to say whether he should quit or work for nothing, or whether they would pay him what they thought his services were worth to the county independently of the act, and that the resolution was subsequently passed. The collector, Mr. Hollock, swears that he considered himself bound to pay the money according to the resolution, seeing that the payment was not under the act.

The act of 1876 provided that no additional compensation should be paid to the deputy clerks by the counties. By additional compensation, was meant pay in addition to what the deputies might receive from their employers, the clerks—that is, they were to receive no pay from the counties. The deputy clerk of Camden was, when this resolution was passed, entitled to no pay from the county, unless he was entitled to it under the act of 1882. Not only so, but the act of 1876 provided that none should be paid to him. His right to receive pay under the act of 1882 was denied by the bill, and he was prohibited by the injunction from receiving it until the further order of the court to the contrary. And the collector was in like manner commanded not to pay it. Nevertheless, by a proceeding designed to evade the injunction and to do substantially the thing prohibited, notwithstanding the interdict, the collector paid and the deputy clerk received salary at the rate of \$160 a month, or \$1,920 a year, out of the county treasury, for services as deputy clerk up to the 1st of October. It is to be observed that the resolution was not passed until October 9th, and its provisions

Gibbs v. Morgan.

covered all the time for which the deputy clerk claimed salary under the act; for it appears by the record of the judgment that he had been paid his salary up to June 1st, when the bill was filed. It is also worthy of note that the salary under the act was \$166.66 $\frac{2}{3}$ per month; that given by the resolution was \$160 a month. As matters now stand, if the injunction shall be dissolved, he will be entitled to receive for his services pay under the act at the rate of \$2,000 a year, and under the resolution, also, at the rate of \$1,920 a year—that is, allowing both, at the rate of \$3,920 per year. He has a judgment against the county for one month's salary (for June) under the act, so that, unless he has agreed to accept the pay under the resolution instead of the salary, he will have a claim to two salaries out of the county treasury for the same services. If there was an understanding between him and the board of chosen freeholders that the salary under the resolution should be substituted for that given by the act, then the breach of the injunction is obvious. The proceeding by which the injunction has been violated is a manifest, palpable and confessed subterfuge. It is as if the court should enjoin the payment of money upon a contract for services, and in defiance of the injunction, payment should be made, accompanied with a declaration that it was not made under the contract, but for the services which were the subject of it, and that the payment was not at the contract price, but at one which seemed just, irrespective of the terms of the contract, although it might be the same, or even a greater price. The breach of the injunction would be too plain to admit of any attempt at denial. So here the defendants claim (and that is all the defence) that the salary was not paid under the act at all, but was paid under the resolution, because it could not, by reason of the injunction, be paid under the act. The act of 1876 declares that no compensation shall be paid to the deputy clerks by the counties. Therefore, unless the deputy clerk in this case was entitled to his salary from the county under the act, it was not lawful to pay it to him.

The defendants urge that the board of chosen freeholders were not parties to the suit, and hence were at liberty, so far as this court was concerned, to pass the resolution and pay the salary,

Kerr v. Little.

although the payment of the salary was illegal. But the collector and the deputy clerk were amenable to this court and were under its interdict, and it appears, clearly, that they both fully understood that the plan of paying the salary under the resolution was devised merely as a means of doing that which the injunction forbade—of making the payment in spite of the injunction. They must be both adjudged guilty of contempt. There will be an order for an attachment accordingly.

JOHN KERR

v.

HENRY S. LITTLE, receiver &c.

The complainant made a contract with the receiver of a railroad (the defendant's predecessor) to remove the coal, ashes and cinders from a specified ash-pit on the railroad, and to have therefor the coal, ashes and cinders so removed. He alleges that the former receiver refused to allow him to perform the contract, and that he thereby sustained great damage.—*Held*, on demurrer, that this court would entertain jurisdiction of the suit, on the ground that the contract having been made with a former receiver, the present receiver (the defendant) cannot be sued thereon at law, and the claim is against the trust funds of the railroad company, which are still under the control of this court.

Bill for relief. On general demurrer.

Mr. B. Williamson, for demurrant.

Mr. A. A. Clark, for complainant.

THE CHANCELLOR.

This is a suit in equity for damages for the breach of a contract made by the late receiver of the Central Railroad Company of New Jersey, Francis S. Lathrop, deceased, with the complain-

Kerr v. Little.

ant. The defendant has filed a general demurrer. If the principle laid down in *Palys v. Jewett*, 5 *Stew. Eq.* 302, extends to this case, it is manifest that the bill must be dismissed. It was there authoritatively held that this court has no jurisdiction to determine the question as to the liability of a receiver for damages for injury sustained through the negligence of his employees in the management of the trust property (in that case a railroad train), because this court cannot assess the damages, that power being exclusively within the jurisdiction of the courts of law. This is a mere claim of damages of a character clearly within the jurisdiction of the legal tribunals. The ground of the complaint is that the late receiver contracted with the complainant for the daily removal by the latter, for a year, of the coals, ashes and cinders (from the locomotive engines) from an ash-pit at a railroad junction on the Central railroad, in consideration whereof the complainant was to have such coals, ashes and cinders, and that before the end of the year the receiver refused to permit the complainant to remove them, by reason of which refusal the complainant sustained injury by being deprived of the coals and cinders. The claim is, as before remarked, of a character cognizable in the courts of law; but the complainant alleges (and truly) that he is without remedy at law. He cannot maintain an action against the present receiver on the contract, for he did not make it. It is obvious that to turn the complainant over to the courts of law for redress would be a denial of justice. But that consideration would not be enough of itself to give jurisdiction to equity, for if this court cannot determine the liability and assess the damages, whatever the hardship, it can give no relief. There is a ground on which, giving full scope to the decision in *Palys v. Jewett*, this bill can, in my opinion, be maintained. Assuming, as we may, that the allegation of the bill, that the complainant is without legal remedy, is true, the fact that he has a claim upon the trust estate still under the control of this court, entitles him to redress here. In the case in hand the contract was neither made nor broken by the receiver in person, but was both made and broken by his subordinates, who had charge of the matter. When damages are sustained by reason of the

Kerr v. Little.

negligence of a receiver's employees, without personal fault on his part, in matters necessarily or properly committed to them in the management of the trust property, as, for example, in operating railroads, the damages which may arise from the negligence or misconduct of such employees, without his participation therein, are, as between the receiver and the trust estate, to be paid, not by him out of his own money, but out of the trust property. If this is the rule as to torts, it must be equally so also in regard to contracts. Where the receiver's subordinates enter into a contract in the course of their management of the business entrusted by him to them, and damages arise from their breach thereof, those damages, as between the receiver and the trust estate, are to be paid out of the latter. Suits for damages in either of the cases named are to be regarded as in the nature of proceedings *in rem* against the trust estate.

In *Davis v. Duncan, receiver* (U. S. C. C.), 23 Law Reg. (N. S.) 532, it was held that the discharge of a receiver of a corporation by the court, and the restoration of the property to the corporation, without any reservation of jurisdiction as to existing rights of action, discharges the receiver and the property from liability to suit for injuries inflicted through the negligence of agents or employees of the receiver. Were the complainant in this suit to bring suit at law against the late receiver's executors to recover the damages which he claims, it is most manifest that they would, if the action could be maintained against them, have recourse to equity to protect his estate against being compelled to pay the damages, and that equity would protect it accordingly. Unless this be so, who would accept an appointment to the office of receiver of a great business corporation, especially a railroad company, and be liable in his own estate for the consequences of the neglect and misconduct of his numerous employees, in whom he must necessarily confide in the discharge of duties and the transaction of business of the trust, which it is impossible for him to do himself, or even to superintend? In *Palys v. Jewett*, the appellate court found a *scintilla* of jurisdiction for equity in the fact that it is necessary to ask its leave to bring an action at law against the receiver, and that such per-

Kerr v. Little.

mission had been sought and denied, and the parties had thereupon submitted themselves to the jurisdiction of this court. In this case, where there is no remedy at law, and the complainant prays relief from this court in view of that fact, and on the ground that it has control over the trust fund, and can pay him his damages therefrom, I cannot but conclude that this court has jurisdiction. Of course it will be its duty in every such case to see whether the contract was such a one as this court, having regard to the interest of the trust, and the extent of the power of the receiver to bind it, would have enforced had the complainant applied for the purpose when it was broken, and if it finds it to have been such, and that the breach was without adequate excuse, it will do in the premises what equity and good conscience require. *Lewin on Trusts* 415. The bill states that the defendant, Henry S. Little, succeeded Francis S. Lathrop in the trust, and charges that he is answerable for the damages in question, and should be required by this court to pay them. By the decree of this court by which part of the property was turned over to the company, jurisdiction was retained over the corporation and the receiver and the property of the company, and otherwise to (among other things) enforce the payment, satisfaction or discharge of all the debts and liabilities of the receivership, and to protect the receiver and the receivership against all debts, claims and liabilities of every character connected with the receivership, and to determine and close up fully and finally all matters connected with the trust; and all those debts and liabilities were charged upon the whole property of the corporation, and it was declared that they should be and remain a lien thereon until paid, satisfied or discharged, as against the receiver or receivership. That decree is indeed not pleaded, but from what was said on the submission of the cause for decision, it is proper to take it into consideration. But further, looking at the contents of the bill merely, it is charged that the receiver is answerable for the damages, and it does not appear that the trust property has been discharged from liability for the obligations of the receivership. The averments are rather to the contrary. The demurrer will be overruled, with costs.

Ballentine v. De Camp.

JOSEPH W. BALLENTINE, trustee &c.,

v.

MARIA M. DE CAMP et al.

A testamentary trust of lands was to pay to the testator's wife and five children, in equal shares, the net rents thereof, and, after the death or remarriage of his wife, to the children, and in case of the death of any of the children, leaving lawful issue, that child's share to be paid to such issue. The testator's wife died in his lifetime, and the five children all survived him. One daughter, Laura, married and died, leaving two children and four grandchildren, the children of her deceased son who died in her lifetime.—*Held*, that each one of Laura's surviving children took one-third of her interest under the trust, and the four grandchildren of Laura's deceased son took the remaining third.

Bill for construction of will. On final hearing on pleadings.

Mr. J. F. Randolph and *Mr. J. E. Ward*, for Maria M. and Edward W. De Camp.

Mr. C. K. Cannon, for the children of James W. De Camp, deceased.

THE CHANCELLOR.

James Wood, deceased, who died in May, 1849, by his will, created a trust, as to part of his real estate, to pay to his wife, so long as she should remain his widow, and to his five children, in equal shares, the net proceeds of the rents, and provided that after the death or remarriage of his wife, such net proceeds be paid over to his five children in equal shares, and added :

“ And in case of the death of any one or more of my children, without leaving lawful issue, then to pay over the share of such deceased child or children to my surviving child or children, in equal parts or shares ; and in case of the death of any of my said children leaving lawful issue, then to pay over his or her share to and among said issue, in equal parts or shares, or to their legally appointed guardian during minority.”

Ballentine v. De Camp.

The trust was to end on the death of all of his children, and the estate to go to the "right heirs" of his children in fee as tenants in common; the child or children of any deceased child to take the part or share of the trust estate that the parent would have taken had the testator died intestate. The testator's wife died in his lifetime. His children all survived him. They were William N., Sarah Ann, Jane Elizabeth, Theodore T., and Laura Louisa. The last-named afterwards married John De Camp and died in April, 1884, leaving surviving her two children, Maria M. and Edward W., and four grandchildren, the children of a deceased son, James W., who died in 1882, in her lifetime. At Mrs. De Camp's death, Sarah Ann Wood, one of the testator's daughters, had died childless. The two sons, William N. Wood and Theodore T. Wood, had also died, each leaving children. Jane Elizabeth Wood alone, of the testator's children, survived Mrs. De Camp, and she is still living. The question presented is, whether Mrs. De Camp's children and her grandchildren take her share *per capita*, or whether the grandchildren take only the share of their deceased father—that is, whether the grandchildren together take one-third of her share (each one-twelfth), or are each entitled to one-sixth. Whether the provision in regard to death without lawful issue in the clause under consideration is to be construed as meaning death in the lifetime of the testator or not, the decision of the question will be the same. For if it is to be so construed, the interest of Mrs. De Camp was a vested one at the testator's death, and at her death that interest went to her surviving children and her grandchildren, the children of her deceased son, whose interests therein are fixed by the statute of distributions. Mrs. De Camp appears to have been a widow at the time of her death. Under that statute, her two surviving children would each be entitled to one-third, and the four grandchildren (taking together what would have been their father's share) each to one-twelfth. If the provision be construed (as I think it should be) to mean death either before or after the testator's death, the grandchildren are entitled to take as issue, but only *per stirpes*. The gift to the testator's children is for life

Ballentine v. De Camp.

only, and at the death of any of them the issue of the decedent is to take his or her share. The language of the will is :

“In case of the death of any of my said children, leaving lawful issue, then to pay over his or her share to and among said issue, in equal parts or shares.”

Mrs. De Camp's share was, under that provision, to go, upon her death, to and among her issue. Our statute of descents provides that under a devise to one for life, and at his death to his heirs, heirs of his body or issue, the property devised shall go to the children of the life-tenant in fee, and if any child be dead, his or her issue is to take the part which would have come to him or her if living. *Rev. p. 299 § 10.* The will shows that the testator intended that his children's children should take the share of their parents in the places of the latter. In providing for the division of the trust property under the trust now under consideration, at the death of his last surviving child, he directs that the property go to their respective right heirs in fee simple, to hold as tenants in common and not as joint tenants, and adds :

“It being always understood that the child or children of any of my deceased children shall take the part or share of the said trust estate that the parent would have taken had I died intestate.”

And again :

“The child or children of each deceased child taking the part or share which the parent would be entitled to.”

In the gift of the residue in the last codicil similar language is employed. By the term “issue” he meant children. The gift of the share of rents was to Mrs. De Camp for life, and if she should die before the end of the trust it was to go to her children. Her deceased son's share of it went to his children. It has been often held that the distribution under such a provision as that under consideration is stirpital. *Orton's Trust, L. R. (3 Eq.) 375 ; Bryden v. Willett, L. R. (7 Eq.) 472 ; Ross v. Ross, 20 Beav. 645 ; Robinson v. Sykes, 23 Beav. 40.* There will be a decree in accordance with these views.

Matthews v. Dellicker.

CHARLES B. MATTHEWS et al.

v.

WILLIAM DELICKER et al.

The income of a testamentary trust fund was given to a testator's wife for her life or widowhood, for the maintenance of herself and children, with a provision, among others, that if the children should be of age at the time of their mother's death or remarriage, the principal of the fund should be equally divided among them. They are now all of age, and their mother survives, unmarried.—*Held*, that, upon the application of the mother and children, the moneys derived from the condemnation of part of the lands covered by the trust for the purposes of a railroad company, could be devoted to erecting a building on another part of the lands covered by the trust, the present buildings whereon are very dilapidated.

Bill for relief. On final hearing on pleading and proofs.

Mr. F. Adams, for complainants.

Mr. C. Borchertling, Jr., for executors.

Mr. R. Wayne Parker, for receiver.

THE CHANCELLOR.

Patrick Matthews, late of Morris county, died October 21st, 1866. By his will, he gave the residue of his estate, real, personal and mixed, to his executors, their heirs, executors, administrators and assigns forever, in trust, nevertheless, to collect and receive the rents, profits, interest and income thereof and to pay them to his wife for the support of herself and his children by her for and during her natural life, in case she should so long continue to be his widow, and on her death or remarriage, to pay them, in equal shares, to those children until the youngest of them who might survive should arrive at the age of twenty-one years; and when the youngest of them should have attained to that age, then, after the death or remarriage of his wife, to

Matthews v. Dellicker.

assign, transfer and pay over to those children all his estate, in equal shares ; and in case of the death of either or any of them before the youngest should have attained to majority, leaving issue, then, after the death or remarriage of his wife, to pay over, assign and transfer the share or shares of such child or children to his, her or their lawful issue ; and in case of the death of any of the children before the youngest should arrive at the age of twenty-one years, without lawful issue, then, upon the death or remarriage of his wife, to assign, transfer and pay over the share or shares of such child or children to the survivor or survivors of such children. Part of the real estate which constituted part of the residue, was taken in 1869, by condemnation, for the use of the Newark and New York Railroad Company, under the charter of that corporation, and the money (\$12,415) awarded for the value of the land was, after deducting certain costs and fees, ordered by the court of common pleas of Essex county, March 28th, 1870, to be deposited with the Newark Savings Institution in the name of the estate, subject to the order of that court, the interest to be payable to the executors for the use and benefit of the widow and minor children, according to the will, but the principal to remain on deposit there until the further order of that court. The amount so deposited was \$12,377.42. The interest thereon was paid over to the executors up to the time of the suspension of the savings institution in 1877. By order of this court of June 29th, 1878, it was ordered that the dividends of principal of the deposit paid by the institution on account thereof be deposited on what was called "new account" in the institution, the interest thereon, after such deposit, to be paid to the executors. The savings institution again, in May, 1884, suspended payment, and was declared insolvent on proceedings in this court, and a receiver appointed. The institution had paid to the new account ninety-five per cent. of the principal of the original deposit. On the new account two dividends, amounting together to seventy-five per cent., have been ordered, which remain in the hands of the receiver.

The bill is filed by the widow and the children of the testator, the beneficiaries named in the residuary clause, against the execu-

Matthews v. Dellicker.

tors and the receiver, and its object is to dispose of the fund. It prays that this court will direct that the fund be paid over to the executors, or be paid into and kept in this court for the benefit of the complainants, so invested as to produce interest, to be paid over to the widow, or that the *corpus* be paid over to her and them, in equitable proportions, or that this court will give aid and direction to the executors in respect to the trust; and there is also the prayer for relief, generally.

The children of the testator by his last wife are all of full age. It appears by the testimony that they and the widow all desire that the fund in question—the money in the savings institution—be used to build a house upon a lot which is part of the residuary estate, and is situate on the corner of Union and Ferry streets, in the city of Newark. The building now upon that lot is old and in a dilapidated condition, and produces but little rent; it is not worth repairing, and, of course, is not desirable either for residence or business purposes. The lot is in a good location, and is such as to warrant the erection thereon of a substantial brick building, to be used for residence and as a place of business. The property, in its present condition, produces but little, if any, more rent than will pay the taxes and insurance. The residuary estate does not produce enough income to support the widow.

The interest of the children in the residuary estate is a vested remainder. The interest of the widow is the use of the estate during widowhood. At her death or remarriage, if the youngest child shall then have attained to majority, the *corpus* is divisible, in equal shares, among the children. The youngest child is over twenty-one years of age. There is a provision in the will that in case of the death of any of the children before the youngest shall have attained to majority, leaving issue, his, her or their share shall, in the division, go to his, her or their issue, and that in case of the death of any of the children before the youngest shall have arrived at the age of twenty-one years, without lawful issue, then, in the division, the share or shares of such child or children so dying without issue shall go to the survivors or survivor. But the event of death before the youngest

Lillis v. Gallagher.

child shall have attained to majority (the contingency on which the issue are to take by substitution, and on which the gift over to survivors is to take effect), never can happen. The interests of the children are therefore vested absolutely. They and their mother may join in the disposition of the fund in question, and with their consent (already given in their testimony) the fund may be invested in building on the lot before mentioned. The building may be erected by the executors, who will be empowered to use the money for the purpose. The executors and the widow and children can probably agree as to the character and cost of the building.

MARTIN D. LILLIS

v.

ALEXANDER GALLAGHER et al.

The complainant recovered a judgment at law against the defendant's brother for false imprisonment, and afterwards filed a creditor's bill to set aside, as fraudulent, two conveyances of lands by the brother to the defendant. The evidence showed satisfactorily that the lands in question, in fact, belonged to the defendant, although the legal title thereto had been in the name of his brother.—*Held*, that, as the cause of the action at law had been a tort, there was, against the defendant, no ground of estoppel such as sometimes exists where the cause of action is founded on a contract, and the credit has been given under the belief that the debtor was the true owner of the property, of which he had the legal title only, but not the equitable title.

Bill for relief. On final hearing on pleadings and proofs.*Mr. E. D. Deacon*, for complainant.*Messrs. Henry & Dickinson*, for defendants.

Lillis v. Gallagher.

THE CHANCELLOR.

This is a creditor's bill. Its object is to subject to the payment of the complainant's judgment against the defendant, Alexander Gallagher, certain real estate in Jersey City, which the latter, with his wife, conveyed to his brother, Joseph Gallagher, the other defendant, September 27th, 1883. The property in question consists of two houses and lots. It was bought by Alexander, and the title taken in his name. One of the properties was conveyed to him in 1868, and the other in 1876. The complainant's judgment was recovered in an action for damages for false imprisonment. It was entered January 23d, 1883, for \$550.68 damages and costs. The summons in the suit was issued September 21st, 1882, and served on the 26th. The conveyance of the two properties by Alexander and his wife to Joseph was made, as before stated, on the 27th, the next day after the summons was served. Alexander was, when the imprisonment for damages, for which the judgment was recovered, took place, a policeman in Jersey City, where he lived, and the imprisonment occurred while he was on duty as such officer. The complainant alleges that the properties both belonged to Alexander, and that the transfer thereof to Joseph was fraudulent, and designed to defeat, hinder or delay him in collecting the judgment he might recover in his suit, which had then been begun. The defendants, on the other hand, allege that Alexander, though he held the legal title to the properties, never was the equitable owner thereof; that he held them subject to, and upon a resulting trust in favor of Joseph, at whose request, and for whom they were bought, and who paid all the purchase-money. Both testify that Joseph furnished all the money for the purchase of the properties, and that they were bought for him, by his direction, by Alexander, who held them for him on an understanding between them that he was to hold them for Joseph, and convey them to him on demand. Alexander managed the properties, collected the rents, paid the taxes &c. &c., and accounted to Joseph. He made repairs, but only by Joseph's direction. Joseph was and is unmarried, and has boarded with Alexander all the time, as he still does. In all

Sharp v. Wyckoff.

things Alexander recognized Joseph as the owner of the properties. Since they were bought, Joseph has bought other real estate in Jersey City, and Alexander now lives in another house, not one of those in question, also owned by Joseph, for which he pays him rent. Alexander has never had any money to invest. He says he has always worked for small wages, and he has had a family to support. He swears that in purchasing the properties he acted wholly as Joseph's agent, and by his direction,* and that they were bought entirely with Joseph's money, and for him; that he took title in his name for Joseph, and at his request, and held it for Joseph, who, he says, allowed him something for his services in taking care of the properties for him. He says, also, that Joseph did not request him to convey them to him, but that he did it of his own accord, in order that they might not be made chargeable with his debts. While he was a man of no means, Joseph was prosperous, and had the money with which to buy the properties. There is no evidence to contradict their testimony, and there is no reason to doubt the truth of their statements. The cause of action having been a tort, the ground of estoppel, which is sometimes found in cases in which the claim is upon contract, and credit has been given on the belief that the debtor was the true owner of property of which he had the legal title only, but not the equitable title, is not found here. The bill will be dismissed, with costs.

JOHN W. SHARP

v.

MARTIN WYCKOFF et al.

Where the insufficiency of proof is due to the inadvertence of counsel, a cause may be ordered to stand over, after final hearing, for the purpose of supplying the additional proof.

Sharp v. Wyckoff.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. A. A. Clark, for complainant.

Mr. H. B. Herr, for defendants Wyckoff and wife.

THE CHANCELLOR.

The defence is a tender by the mortgagor. The proof is defective. It does not show that the complainant knew or had reason to suppose, at the time the tender was made, that the person who made it did so for or in behalf of the mortgagor. After that time a demand was made upon the mortgagor, in behalf of the mortgagee, for the money due on the mortgage, and it is admitted that she could not, on that day, get it from the bank in which she had deposited it after the tender; but it does not appear when the demand was made—how long before the filing of the bill. The proof on the whole subject is meagre and insufficient. Application is made to add to it by re-examining the witnesses, or otherwise. In *Beckmann v. Hoboken Bank for Savings*, 10 Stew. Eq. 331, on appeal, the court of errors and appeals ordered that the proofs be opened to let in new testimony to establish the consideration of a deed successfully attacked in this court for fraud, although no application had been made in this court on the subject, and the applicant had been twice heard here. In the case in hand it seems that the insufficiency of the proof is due to inadvertence of counsel. The case will stand over for decision until after the additional proof shall have come in.

Wiley v. Morris.

DAVID WILEY, trustee &c.,

v.

WILLIAM MORRIS et al.

A testator gave to his son (the defendant) all the implements, materials &c. in his oil-cloth factory, which were to be valued at cost, and sufficient money added to such valuation to make a total of \$30,000. He then gave to trustees (the complainant) all the residue of his estate, to permit defendant to use and enjoy the land and buildings constituting his oil-cloth factory, without rent or charge, so long as defendant carried on the business alone, without a partner, the defendant to pay all taxes thereon and keep the works in good repair, make all improvements and keep the same insured at his own expense, otherwise the premises were to be sold &c. The defendant received the tools, stock &c., and also the money, which, added to the valuation, made up the \$30,000. The factory itself was appraised at \$14,000. The complainant expended \$2,000 in finishing buildings which were unfinished at the testator's death. The cost of the factory, including that expenditure and the cost of the land, was \$21,000. The defendant has complied with all the conditions of the trust relative to the taxes, repairs and insurance. He expended, prior to December 31st, 1881, \$3,660 in new buildings and machinery and repairs. All the buildings were insured in the complainant's name as trustee. In 1881 one of the buildings, with the machinery therein, was destroyed, and portions of others of the buildings injured, by fire, and the proceeds of the insurance, about \$6,000, were paid by the companies to the trustee, and were by him paid to defendant, who expended that and also about \$18,000 of his own money in new buildings and machinery, built partly on the trust land and (as to one building) partly on his own adjoining land. The value of the buildings &c. on the trust property has been doubled by the defendant, and new buildings &c., including cost of land, worth \$48,000, erected on his own property adjoining, and used by him in connection with the original factory, all of which have been insured by defendant in complainant's name. In 1884 the paint-shop was again burnt, and almost all the other buildings so damaged that manufacturing was suspended until after they had been repaired. The loss was adjusted at \$29,000, and complainant has received thereof \$21,000, and paid \$11,000 to defendant, who has begun to rebuild, and in doing so has placed one of the buildings, in part, on his own land; but even if such part should be severed from the part on the trust lands, the latter would not be essentially impaired. The defendant's reasons for such location are to increase his facilities for business and to reduce the chances of loss by fire.—*Held*, that the defendant is bound to keep the premises insured to an amount equal to the original valuation of the trust buildings &c., and the value of the complainant's improve-

Wiley v. Morris.

ments, such insurance to be in the name of the trustee; that in making restorations, the plant on the trust property should be kept complete in itself, so that severance of the buildings thereon from those on the adjoining land would not destroy the usefulness of the former as an oil-cloth factory; that any improvements put upon the premises by the defendant are to be regarded as trade fixtures, and subject to removal by him or to allowance for their value; that as but an inconsiderable portion of one building is being erected on defendant's own land, the insurance-money may be applied thereto; that should the defendant fail to insure or repair the premises, or to pay the taxes thereon, the complainant ought to do so, and retain the cost from the defendant's income in his hands; and, finally, that as an infant is interested, the matter must be referred to a master to ascertain and report the facts, although complainant and defendant substantially agree as to them.

Bill for construction of will, and instruction of trustee as to his duty thereunder. On final hearing on bill and answers.

Mr. M. P. Gray, for complainant.

Mr. W. T. Hilliard, for defendant William Morris.

THE CHANCELLOR.

John H. Morris, deceased, late of the county of Salem, died in September, 1879. By his will, which is dated August 30th in that year, after directing payment of his debts and funeral expenses, he provides, amongst other things, as follows:

"I give and bequeath to my son, William Morris, the tools, implements, materials, stock in trade, unfinished and finished goods, and other appurtenances of my oil-cloth manufacturing business in the city of Salem, the same to be valued at a cost valuation; and I also give to him as much money in cash as shall be sufficient, when added to such valuation, to make the total of such valuation and said money in cash to amount to the sum of \$30,000; and this bequest is to take effect at once upon my death, unless before that event I shall have given to my said son the said goods, chattels and personal property, and said cash mentioned hereinbefore in this paragraph; in which case this bequest shall be void. * * * I give, devise and bequeath unto David Wiley, of Salem, New Jersey, and William Summerill, son of Garret Summerill, of Upper Penn's Neck, in said county, and the survivor of them, all the rest and residue of my real and personal estate, of whatsoever kind and wheresoever situate, of which I may be seized and possessed, or to which I may be entitled at the time of my death; to have and to hold unto the said David Wiley and William Summerill, and to the survivor of them, and to

Wiley v. Morris.

the heirs and assigns of such survivor forever. In trust, nevertheless, and this bequest and devise is made upon the following express trusts and confidences --that is to say, in trust that the said David Wiley and William Summerill, and the survivor of them, shall permit and suffer my son, William Morris, to have, hold, occupy and enjoy the land and premises, in the city of Salem, belonging to my oil-cloth factory, without rent or charge, so long only as my said son shall continue, personally, to carry on the said oil-cloth business solely, without any partner; my said son paying all taxes assessed on said premises and keeping the same in good repair, and making all improvements thereon and keeping the same insured at his own expense. And in case my said son shall not continue, personally, to carry on said business solely, without any partner, then, in further trust, to sell and convey the said oil-cloth factory, land and premises by good and sufficient deeds in the law as said trustees, and the survivor of them, may deem to the best advantage, and invest and apply the purchase-money in the manner hereinafter directed as to the residue of my estate."

The will also gives to William Morris the income and rents of all the rest of the estate for life; at his death the property is to go to his child or children, with substitution of issue in case of decease, and limitation over to the testator's brother Josiah and his sisters Mary and Emma. The will appoints Messrs. Wiley and Summerill executors. It was proved by Mr. Wiley alone. Mr. Summerill renounced, and refused to serve as executor or trustee. William Morris, soon after the testator's death, received the tools, stock &c. and the cash to make up the difference between the amount of the valuation thereof at cost and \$30,000. In the inventory and appraisal, filed by Mr. Wiley, and which were made October 2d, 1879, the oil-cloth factory property was appraised at \$14,000. The trustee expended about \$2,000 subsequently in completing a part of the buildings of the property which were unfinished at the testator's death. The cost of the property, including this latter expenditure and the cost of the land, was \$21,067.23. William Morris went into possession of the premises under the provisions of the trust, and has complied with the conditions as to the payment of taxes, keeping the property in repair, and insuring it at his own expense. He has also been at the expense of all improvements put thereon. He expended prior to December 31st, 1881, in building a new building and in improved machinery and re-

Wiley v. Morris.

pairs upon the trust property, \$3,660. He insured the trust property in the name of the trustee. On or about December 31st, 1881, one of the buildings and the machinery therein were destroyed, and portions of others of the buildings injured by fire. The insurance money, \$6,077.11, was paid to the trustee, and was by him handed over to Mr. Morris, to be expended in restoring the property. This was done. Mr. Morris also put other buildings and machinery on the premises at his own expense, as they became necessary for the business, and, in doing so, spent a large sum of money. One of the buildings restored—the paint shop—was rebuilt partly on the trust land and partly on land adjoining, owned by Mr. Morris. The cost of the restoration and improvements made on the trust property by Mr. Morris after the fire, was \$24,503.38, including the \$6,077.11 insurance-money. The value of the plant on the trust land alone, estimated at the appraised valuation, was doubled. The whole plant, including the valuable improvements put by him on the adjoining land bought by him for the purpose, to be used in the business, was worth, including the cost of those lots, \$48,000. The premises, as thus restored and improved, including the buildings and improvements put by him on his adjoining lots, were insured by Mr. Morris, and, as before, in the name of the trustee. The premiums therefor were paid by Mr. Morris. On or about April 13th, 1884, the buildings again took fire. The paint shop was destroyed, and almost all the other buildings on the trust property were so damaged that the business could not be carried on until repairs were made. The insurance-money was paid to the trustee. The amount of loss was adjusted between him and the insurance companies at \$29,192.58. Of this amount he has received \$21,209.73 up to this time. Mr. Morris has set about restoring the buildings and machinery on the trust land, and for that purpose has received from the trustee on account, \$11,500. He gave a receipt for the money June 14th, 1884. The instrument contains a statement that he will erect and complete, with the money so paid to him, upon the trust land, buildings and machinery of the same character and extent as those destroyed.

Wiley v. Morris.

In the reconstruction and restoration contemplated he has so located one of the new buildings that a part of it is not on the trust land, but is upon his adjoining land. If, however, that part were severed from the part which is on the trust land, the value and usefulness of the latter would not be essentially impaired. His reason for such location of that building is, that it is necessary in order to furnish adequate accommodation for his increased business, and to reduce the chances of destruction or damage by fire. In the restoration already made, the \$11,500 and \$9,867.33 more, have been expended, and Mr. Morris insists that he has a right, not only to apply the insurance money to erecting those buildings, placing part of them on his own land, but has a right to the whole of that money, and that the trustee holds it merely in trust for him. He claims that the insurance was for his own benefit and not for that of the trust; but he acknowledges his liability to do whatever is necessary to preserve the value and efficiency of the trust property as he received it. A question having arisen between him and the trustee as to their respective rights in the premises, the latter has brought this suit to obtain a construction of the provisions of the will creating the trust, and for instructions as to the respective rights and duties of himself and Mr. Morris under the trust.

He asks the following questions: Whether, under the will, Mr. Morris is bound to keep the buildings and machinery on the trust land insured beyond the appraised value thereof, as stated in the inventory filed by the executor. Whether the insurance Mr. Morris may effect is to be for his personal benefit, or for the benefit of the trust. Whether, in case Mr. Morris fails to pay the taxes, keep the property in good repair, and keep it properly insured, or fails to do any of those things, the trustee should de them out of the income of the other property in his hands in trust for Mr. Morris. Whether Mr. Morris has any claim upon the trust property for or in respect of any improvements he may put thereon. Whether the insurance-moneys recovered by the trustee can lawfully be applied to or for buildings or machinery located outside of the trust land; and what disposition the trustee should make of the insurance-money still in his hands.

Wiley v. Morris.

As has already been seen, Mr. Morris, by the terms of the trust, is bound to pay all taxes assessed upon the trust property, to keep it in good repair, and to keep it insured, at his own expense, so long as he shall occupy it. And he is entitled to occupy it so long as he shall carry on the business of manufacturing oil-cloth there alone, without a partner. When he ceases to occupy it the property is to be sold, and the proceeds of sale are to be invested in the same way in which the trustee is directed to invest the "residue" of the estate. The provision that Mr. Morris shall keep the property insured, at his own expense, is manifestly like the other conditions for payment of taxes and keeping the property in good repair, for the benefit of the trust. The insurance is to be for the benefit of the trust estate, but he is to pay for it. The obligation to keep the premises in good repair would of itself, irrespective of the obligation to insure, require him to restore or rebuild in case of damage or destruction by fire. *Story's Eq. Jur.* § 101; *Re Skingley*, 3 *Macn. & G.* 221. But he is not bound to insure to an amount beyond the value of the buildings and machinery as he received them from the estate. That insurance should be in the name of the trustee. The rest of the value of the property has been created by Mr. Morris by the expenditure of his own money in improvements thereon. He is entitled to the benefit of insuring that value on his own account. He has the right to have the insurance-money received for the buildings &c. insured for the benefit of the trust estate, applied to the rebuilding and restoration of that property, so long as he shall continue to carry on the business there under the provisions of the trust. If he fails to insure according to his obligation, the trustee should himself insure and pay the premiums of such insurance as Mr. Morris is bound to provide, out of the income of the latter in his hands. And so, too, if Mr. Morris fails to pay taxes or to keep the buildings and machinery on the trust property in good repair. The will provides that Mr. Morris shall make all improvements that shall be made on the premises, that is, if he wants any improvements in buildings or machinery &c. he is to make them at his own expense, and they are not to be made at the expense of the trust

Wiley v. Morris.

estate. The testator gave him the use of the property for the purposes of trade. He anticipated that he might require improvements, and gave him permission to put them there. When put there they are to be regarded as trade fixtures put upon demised premises by a tenant, would be, and Mr. Morris will have the same right of removal thereof that such tenant would have. If, at the end of his occupation, they remain there, he will, in equity, be entitled to compensation for them to the extent to which they may enhance the value of the property.

The bill alleges that he proposes to build the paint shop, which is a large and important building, partly on the trust land and partly on his own adjoining land, and that to so build it would greatly impair the value of the part which will be on the trust land, inasmuch as it could not be severed from the other part without thereby materially detracting from its usefulness. The answer, on the contrary, states, and the diagram annexed thereto shows, that the paint shop has already been built entirely on the trust land, and that all of the buildings except the grinding-room building are built entirely on the trust land, and that the part of that building which is built or to be built on Mr. Morris's land has cost, if finished, or will cost when completed, only \$514.69, and can, if or when built, be readily separated from the part which is on the trust land, and that such separation would be without injury to either part. It appears by the answer that Mr. Morris has already expended, in the restoration of the trust property, \$21,367.33. There can be no reasonable objection, under the circumstances, to paying the cost of the grinding-room building out of the insurance money, although part of it is not on the trust land.

In any restoration of the property, the plant on the trust land should be kept complete in itself for the purposes for which it was designed, so that a severance of the buildings not on the land from those upon it would not destroy the usefulness of the latter as an oil-cloth factory plant. It is stated in the answer that the buildings now on the trust land are themselves a complete plant for the manufacture of oil-cloth, and that the plant on the trust

Wiley v. Morris.

land is of greater capacity and value than it was when received by Mr. Morris.

The trustee should pay over to Mr. Morris the balance of the insurance-money in his hands, or which may be received by him, from the fire of April last. The answer states that the reason why Mr. Morris insured the whole property in the name of the trustee was that he was ignorant of his rights in the matter, and supposed that he could not insure in his own name; but he avers that he always thought that the insurance money would be his, and under his control.

The following, then, are the answers to the questions propounded:

Mr. Morris is not bound to keep the buildings &c. on the trust property insured to an amount exceeding their value at the testator's death as increased by the expenditure of the trustee in finishing buildings.

The insurance which he is bound to keep up is for the benefit of the trust estate, and should be in the name of the trustee.

Should Mr. Morris fail to insure according to his obligation to the trust estate, or should he fail to pay the taxes or make the requisite repairs, the trustee should do those things and pay for them out of the income in his hands coming to Mr. Morris.

As to the improvements put by him upon the property, Mr. Morris has the rights of a tenant putting trade fixtures upon the demised premises, and he will, on sale of the property, be entitled in equity to compensation for any existing, permanent improvements put on the trust land by him at his own expense, to the extent to which they may enhance the value of the property at the sale.

The trustee may allow the insurance money in hand or to be received for the loss from the fire of April last, to be applied to paying the cost of the new grinding-room building. He should pay over the balance of that insurance money to Mr. Morris.

Although the bill and the answer of Mr. Morris do not differ in any essential point of fact, yet as there is no proof in the case to bind the infant defendant, there must be a reference to ascer-

Hassell v. Van Houten.

tain the amount for which, on the principles expressed in this opinion, Mr. Morris should insure in the name of the trustee; also, whether the plant on the trust land is complete and as valuable as it was when Mr. Morris received the property from the estate, and whether, if the building or buildings which Mr. Morris proposes to build partly on his own land and partly on that of the trust estate, be so built, the part or parts built on his land can be separated from the other without material damage to the latter, and any other fact which should be established by proof, in order to make a valid decree as against the infant.

ABRAM M. HASSELL

v.

FRANCES L. VAN HOUTEN et al.

Under the statute authorizing the assignment of counsel to indigent suitors, the complainant was assigned to assist the defendant in a suit to recover from a life insurance company the amount of a policy on her husband's life. The complainant thereupon made an agreement with her to prosecute the claim; and, if successful, to receive one-half of the amount recovered, and if not successful, to receive nothing. He did prosecute the suit, paid the costs incurred, and recovered the amount of the policy, \$1,000, besides \$339.27 interest thereon. —*Held*, that he was entitled to one-half of this whole amount.

Bill for relief. On final hearing on pleadings and proofs.*Mr. J. Coult*, for complainant.*Mr. S. H. Baldwin*, for defendant Mrs. Van Houten.

THE CHANCELLOR.

This suit is brought to recover one-half of a fund, represented by a bank check, given by the Masonic Mutual Life Insurance Company, of Newark, in payment of the debt and interest due

Hassell v. Van Houten.

on the decree of this court in *Van Houten v. Pine*, 11 Stew. Eq. 72. For the taxed costs and interest thereon the company gave its check to the complainant in this suit, Abram M. Hassell, Esq., who was solicitor for the complainant (Mrs. Frances L. Van Houten) in that one, and for the debt and interest gave her its check payable to her order. That check was certified to be good by the bank on which it was drawn. Mr. Hassell took possession of it to secure him for the amount of his fee for collecting the money, according to an agreement between him and Mrs. Van Houten on that head, made before the suit was begun. She refused to endorse the check, or to authorize him in any way to receive the money for it, or to pay him the fee, according to the agreement. This suit is brought against her and Messrs. Pine and Ingalls, in their official capacities (one is president and the other secretary and treasurer of the company, which is unincorporated), and the bank, for relief in the premises, to establish Mr. Hassell's lien for the fee on the check and the fund which it represents, and to compel Mrs. Van Houten to endorse the check, or authorize him or some one else to endorse it for her, so that he may draw the money, and after taking out his fee, pay the balance to her. The bill also prays that the company may be

NOTE.—By an old order in chancery, after a party had been admitted to sue *in forma pauperis*, and counsel had been assigned, no fee, profit or reward could be taken by him from the pauper, nor could any agreement be made for compensation afterwards, *Beames on Costs* *118; 1 *Dan. Ch. Pr.* *41.

In *Phillips v. Baker*, 1 C. & P. 533, in an action of *assumpsit* for business done as a solicitor, with the common counts, it appeared that the defendant had employed the plaintiff to defend him in a suit in chancery; that the plaintiff, before filing an answer therein, had prepared a petition that the plaintiff be allowed to proceed *in forma pauperis*, which was ordered, and the answer thereupon entered, but that the suit proceeded no further.—*Held*, that the plaintiff, as solicitor, could only recover the amount of money he had actually paid out.

In *Dooly v. Great Northern Railroad*, 4 El. & Bl. 341, 2 El. & El. 576, the plaintiff sued *in forma pauperis*, and recovered £150, and the court certified for costs. The plaintiff's attorney thereupon paid fees to his counsel, and claimed, in the bill of costs, the fees so paid, and also remuneration for his own services. The master, on taxation, disallowed both. Lord Campbell, at chambers, approved the master's decision. On rule to show cause, Lord Campbell's ruling was affirmed. See, also, *James v. Harris*, 7 C. & P. 257; *Hoare v. Coupland*, 14 Jur. 247.

Hassell v. Van Houten.

required to give to him a new check for, or pay to him the amount of the fee and pay her the balance. A general demurrer to the bill by Messrs. Pine and Ingalls has been allowed, on the ground that the bill presents no claim for relief against the insurance company (*infra p. 113*). Since this suit was begun the money has, by agreement of parties, been drawn upon the check, and after paying \$250 to the complainant on account of his demand, and the like sum to the solicitor of Mrs. Van Houten, the balance has been paid into court to the credit of the cause.

The complainant alleges that Mrs. Van Houten agreed with him, before the suit to recover the insurance money was brought, that, if he would undertake to collect the claim upon the policy, which was for \$1,000, on the life of her deceased husband, she would pay him for his fee for the service one-half of the amount recovered, whether obtained by suit or compromise. If he failed to collect or settle the claim, he was to have nothing. She denies that she agreed to pay him any specified sum for his services, but in her answer admits that before the suit was begun she offered to pay him \$500, but says he declined to accept that sum and declined also to enter into any agreement for payment of his fee out of the money to be recovered, on the ground that the existence of such agreement, if known, might prejudice her in

In *Wright v. Burroughes*, 3 C. B. 344, a pauper plaintiff having, behind the back of his attorney, and under circumstances showing an intention to deprive him of his costs, agreed with the defendants, in an action for unliquidated damages, to execute a release, and the defendant having pleaded the release, the court, at the attorney's instance, set aside the plea, *Tindal, C. J.*, saying: "It is the *spes spoli* alone that induces the attorney to undertake the conduct of a pauper cause." See *Quinnan v. Clapp*, 10 Abb. N. C. 394.

In *Holmes v. Penney*, 9 Erch. 584, the plaintiff brought an action for work and labor, as an attorney. At the trial it appeared, in June, 1851, the defendant retained the plaintiff as his solicitor in a chancery suit, in which he was a defendant; that he stated to the plaintiff that he was a poor man, but that he would be entitled to some property upon his father's death. The plaintiff agreed to do the work "upon the ordinary terms," and consented not to press the defendant, but to wait until he should come into the possession of his property. On July 29th, the defendant obtained an order to proceed in the chancery suit *in forma pauperis*, and the plaintiff was appointed his solicitor therein, and the defendant had counsel also appointed to him. On October 31st, defendant's father died, of which the plaintiff became aware, but took no

Hassell v. Van Houten.

the suit, and told her he would charge her only what was right. The proof establishes, by the weight of evidence, the fact that the agreement was made as alleged in the bill. Not only does the complainant swear to it positively and distinctly, but he is corroborated by proof of the admissions of Mrs. Van Houten that such was the agreement between them. Jacob H. Van Ness testifies that after the suit was ended, she said that she had agreed with Mr. Hassell to give him half of the claim for his services. William M. Smith says she said she had agreed to give Mr. Hassell half of the principal for his services. William M. Clark testifies that she told him while the suit was in progress, and soon after it was begun, that she had employed Mr. Hassell to prosecute it, and that he was to have half of whatever he should recover. There is also evidence that she made a like offer to another lawyer before she employed Mr. Hassell, but the former declined to undertake the business for a contingent fee. There is nothing opposed to this testimony by and on behalf of the complainant, except her own denial (notwithstanding what is said in the answer on the subject) that she ever agreed or offered to pay him any sum for his services. Mrs. Van Houten was in indigent circumstances, and unable to pay a lawyer for his services in endeavoring to collect her claim. Ac-

steps to have the defendant dispaupered. On December 8th, an order was made that the defendant should be dispaupered as from October 31st. On March 10th, 1852, the bill in chancery was dismissed. This action was brought to recover compensation for services performed in the chancery suit, including counsel fees, which, however, had not been paid. The plaintiff recovered a verdict for £180, the full amount of his claim, with leave to the defendant to move to reduce it to such sum as the court should think fit. On a rule to show cause—*Held*, that plaintiff could not recover for the counsel fees demanded by him; nor for "skill and advice" between July 29th, and October 31st; nor for any services rendered by him between October 31st and December 8th, Parke, B., saying: "If the pauper is liable for this part of the claim, it must be by virtue of some contract; but there was no such evidence, and indeed the case was not rested upon that ground at the trial; and if it had been, I think it would have failed, as being a contract without consideration, and consequently *nudum pactum*. The plaintiff clearly had no ground for charging the defendant in his original agreement." See *Revel v. Pearson*, 12 *Ired.* 244.

In *Kelly's Case* (N. Y. C. P.), N. Y. Reg., May 10th, 1883, Mrs. Kelly agreed

Hassell v. Van Houten.

according to the bill, she had offered to settle it with the company if they would pay her a comparatively small sum of money (from \$300 to \$500), enough to buy a lot in a cemetery. The answer does not deny it. Mr. Clark testifies that, after the suit was brought, she requested him to get a settlement with the company on those terms, but he declined. Before Mr. Hassell undertook the business, she appears to have been unable to get anyone to prosecute or undertake to collect her claim, because she was unable to pay for such service. The amount recovered was \$1,339.27, of which \$339.27 were interest. The suit was in progress for over a year and a half. After the decree had been obtained, she said she was willing to pay Mr. Hassell \$500, one-half of the principal, and in her answer she says, as before stated, that she originally offered him that sum. He and she disagree as to his right to one-half, \$169.63, of the interest. There is no legal objection to the enforcement of the contract in question. It has been held by the supreme court that the law of champerty and maintenance does not exist in this state. *Schomp v. Schenck*, 11 Vr. 195. And I do not see any reason for denying the validity of such an agreement. If such agreements cannot be enforced, there must be many cases in which the poor will be unable to assert their rights. It is true our law

with an attorney to give him one-half of what he might recover from a defendant, in an action for personal injuries to her. The attorney began the suit in the superior court, but it was dismissed, with costs. Thereupon he began another action in the common pleas, and obtained an order to proceed *in forma pauperis*; and in this action the plaintiff obtained a judgment.—*Held*, that, as against the plaintiff, the agreement to divide the money recovered was void, because the plaintiff sued as a pauper, and that whether the defendant could, or could not set off the costs of the first action against the costs of the second, so far as the plaintiff was concerned, the attorney could not, by virtue of his agreement, raise that question. See, also, *Clark v. Dupree*, 2 Dev. 411.

An attorney assigned by the court to defend one charged with a crime, cannot recover from the county for his services, *Cooley's Const. Lim.* *334; also *Case v. Shawnee Co.*, 4 Kan. 511; *People v. Albany Co.*, 28 How. Pr. 22; *Wayne Co. v. Waller*, 90 Pa. St. 99; *Wright v. State*, 3 Heisk. 256; *Elum v. Johnson*, 48 Ga. 348; *Rowe v. Yuba Co.*, 17 Cal. 61; *Kelley v. Andrew Co.*, 43 Mo. 338; *Dane v. Smith*, 13 Wis. 585; *Weisbrod v. Winnebago Co.*, 20 Wis. 418; *Reg. v. Fogarty*, 5 Cox C. C. 161; see *Jones v. Goza*, 16 La. Ann. 428; *Gordon v. Dearborn Co.*, 52 Ind. 322.—REP.

Hassell v. Van Houten.

and practice provide for the furnishing by the court of the requisite professional assistance to poor persons having a cause of action or suit, and for the rendering by the attorney or solicitor and counsel, and of all other officers of the court, of their services in the litigation, without compensation, yet there are services, such as the procuring of the necessary proof, and expenses, such as the cost of printing &c. &c., which may be requisite to the vindication of the suitor's rights, which are not thus devolved upon the attorney or solicitor or counsel so assigned. In this case, such an assignment of Mr. Hassell was made. Out of the taxed costs recovered he paid all the fees to which, by law, the other officers of the court who had rendered services in the suit would have been entitled had there been no assignment. It is urged that under that assignment he was bound to render his services without compensation, and therefore is debarred from enforcing the agreement. But the object of the humane provision under consideration is to furnish to indigent suitors the means of vindicating their rights, which otherwise, because of their poverty, they would not be able to assert; and if they are unsuccessful, the officers of the court whose aid has been required under it must of necessity go without compensation. The fact that he has been so assigned will not debar the lawyer from enforcing an agreement for compensation dependent upon success in establishing the right, by which success the suitor will be provided with the means of remuneration. The complainant in this case has established a valid contract for the payment to him, for his services, of one-half of the sum recovered, besides his costs, and he should be decreed to have a lien accordingly upon the fund in court for so much of his claim as still remains unpaid, besides his costs of this suit.

Besson v. Gribble.

JOHN C. BESSON, executor,

v.

CATHARINE GRIBBLE, *alias* COX.

The defendant claimed to be entitled to dower in the testator's real estate. On bill filed to quiet title—*Held*, that the proof showed that she was not his wife, and therefore it should be decreed that she was entitled to no dower, and must give up possession of the property in which he and she lived together at his death, and of which she continued to hold and claim possession as his widow.

Bill for relief. On final hearing on pleadings and proofs.*Mr. J. C. Besson, in pro. pers.**Mr. J. Chapman, for defendant.*

THE CHANCELLOR.

The complainant is the executor of the will of William Cox, deceased, late of West Hoboken, and the bill is filed to quiet title to the testator's real estate from the claim of the defendant to dower therein. By the will, the executor is authorized and empowered to sell all of the testator's real estate. The defendant lived with the testator in West Hoboken for many years, and up to the time of his death, and had three children by him. In the will he makes the following devise and bequest to her :

"I do give, bequeath and devise unto my housekeeper, Catharine Gribble, the house and lot of land, being 75 feet by 100 feet, whereon I now reside, in the said county of Hudson, to have and to hold the same to herself, her heirs and assigns forever; also my gold watch, all the furniture in said house and all my wearing apparel, which devise and bequest is intended to be in lieu of all claims for wages or other services to me by her rendered."

This is followed by a gift to his "natural children" then or thereafter "to be born of the body of said Catharine Gribble."

Besson v. Gribble.

At the time of the testator's death he was not living in the house devised to the defendant, but was living with her and their three children in one in West Hoboken, standing on land owned by him and his brother as tenants in common, and she, ever since his death, has continued to reside there, as she still does, claiming, as widow, possession of it as her husband's mansion-house. The testator's personal estate is of the value of \$18,000, and his debts amount to over \$34,000. It is therefore necessary to make sale of some, if not all, of his real estate in Hudson county (it is said to be worth \$25,000 or \$30,000) to pay his debts. It is needless to say that the defendant's claim that she is the testator's widow, and as such entitled to dower in all his real estate, prevents the complainant from obtaining such a price for the property as he otherwise could get, and so inflicts an irreparable injury. An expert witness testifies that the difference would be fifty per cent. The executor cannot bring her claim to a test in any court of law, for he has no title, but only a power of sale. And she retains possession, as widow entitled to dower in it, of the property where the testator lived at the time of his death, and the executor cannot deliver possession of it to a purchaser, nor can he obtain possession by means of legal proceedings, for the reason before given—that he has no title. The defendant does not, either in her answer or in her testimony, directly allege that she was married to the testator. In the former she says, in response to the allegations of the bill, that she admits that she has claimed and still claims to be his widow, and as such widow to have rights in all the lands of which he died seized. This answer is a sufficient averment for the purposes of the suit—that she was married to the testator and claims dower as his widow. In her testimony she says she has three children living by her "marriage" with the testator, and she speaks of him as her deceased "husband." The evidence does not establish her marriage to him. She relies for proof of it on the fact that they cohabited for many years, and that he sometimes introduced her to people as his wife. One of her witnesses says that, although the testator introduced the defendant as his wife, and always called her his wife in the witness's presence, he, the witness, knew

Hassell v. Van Houten.

that he had never been married to her, but lived with her as his wife. It is proved that she was sometimes called and known as Catharine Gribble and sometimes as Catharine Cox. The testator in his will styles her his housekeeper, Catharine Gribble, and speaks of the natural children he had or might have by her. The will was made in June, 1871, and the testator died in May, 1878. Three of their children were born before the will was made, and the other two months after that time. The provision made for the defendant in the will is to be in lieu of all claims for wages or other services by her to him. It appears that the testator, while they lived together, conveyed real property, by deed, without her joining in the deed, and that such title was accepted as satisfactory. The relation between them was evidently not conubial but meretricious.

There will be a decree that she is not entitled to dower in the lands of which the testator died seized, or to which he was entitled at his death, and she will be enjoined from setting up or making any claim to dower in those lands or any of them. She will also be required to give up possession of the property occupied by her.

ABRAM M. HASSELL

v.

FRANCES L. VAN HOUTEN et al.

The defendant recovered from an insurance company the amount of a policy on her husband's life. The complainant was her solicitor in that suit. The insurance company paid the complainant, by its check, the amount of the taxed costs in the suit, and gave him also another check, certified by the bank on which it was drawn, for the amount due defendant, and drawn payable to her order. In a controversy between her and her solicitor over his share of the proceeds of the latter check—*Held*, that a demurrer, on account of his having made the insurance company a defendant, should be allowed.

BAIL for relief. On general demurrer.

Hassell v. Van Houten.

Mr. C. Barcherling, for demurrants.

Mr. J. Coult, for complainant.

THE CHANCELLOR.

The complainant was the solicitor of the defendant Mrs. Van Houten, in a suit in this court (*Van Houten v. Pine*, 11 *Stew. Eq.* 72) to recover the money due on a policy of insurance issued by the Masonic Mutual Life Insurance Company. The suit was successful, and the company paid the decree by its two bank checks, one payable to the complainant for the taxed costs, and the other payable to Mrs. Van Houten for the debt. The former check was delivered to the complainant, and the latter to her, but was taken by the complainant into his possession, he claiming a lien thereon for the amount which he alleged was due to him from her, by agreement, for his counsel fees, to be paid out of the money recovered for the debt. The check was certified by the bank to be good. Proper discharges were executed and delivered to the company. A controversy arose between the complainant and Mrs. Van Houten as to the amount of his fees. She refused to endorse the check, or otherwise authorize him to receive the money upon it, or to pay him his fees. He thereupon brought this suit for relief in the premises, and made William E. Pine, president of the company, and Charles H. Ingalls, its secretary and treasurer (the company is unincorporated), and the bank, parties. Messrs. Pine and Ingalls have filed a general demurrer, and insist that they ought not to be made parties to the suit. It appears that the company has paid the debt and obtained its discharge, and the bank has certified the check. The effect of the certificate upon the check is to make the bank liable for the payment of the money thereon, as fully as if it had paid the check to Mrs. Van Houten, and she had deposited the money in the bank to her credit. *Dan. Neg. Inst.* § 1603. Generally, no person should be made a party who has no interest in the suit, and against whom, if the suit be brought to a hearing, no decree can be made. *Story's Eq. Pl.* § 231. On a bill to restrain the execution of process in his hands,

Eckerson v. McCulloh.

or the performance of his official acts, a sheriff may be made a party, as the object of the injunction is to restrain him from acting. *Brooks v. Lewis, 2 Beas. 214*. In this case no ground is suggested for making the company (by its officers) a party, except an apprehension that in some way Mrs. Van Houten may, by some arrangement with the company, manage to circumvent the complainant, or embarrass him in securing his claim. But the bill makes no averment that any such proceeding is threatened, or even meditated. The bill, indeed, prays that the company may be required to give the complainant a check for, or pay him the amount of the fees, and pay Mrs. Van Houten the balance of the amount of the check, which is the subject of this suit, but such action is not necessary to enforce the complainant's claim, and therefore the company ought not to be drawn into this controversy, in which it has no interest whatever. There is no ground for making the company a party. The demurrer, therefore, will be allowed, with costs.

JACOB ECKERSON

v.

JAMES W. McCULLOH et al.

The evidence in this case clearly established the complainant's right to redeem part of certain land, under an agreement with the defendant to attend a sheriff's sale thereof under foreclosure, and to bid it in for complainant's benefit. Part of the land was conveyed by the sheriff's grantee to a railroad company, by a deed which had not been recorded when the bill was filed.—*Held*, that the seventy-eighth section of the chancery act (*Rev. p. 118*) applied to the case, and that the suit, therefore, was not defective for want of parties.

Bill for relief. On final hearing on pleadings and proofs.*Mr. C. H. Voorhis*, for complainant.

Eckerson v. McCulloh.

Mr. W. B. Williams, for defendants.

THE CHANCELLOR.

This suit is brought to redeem a tract of land of about two and one-half acres, at New Durham, in Bergen county. The complainant alleges that the property being advertised for sale under an execution issued in a foreclosure suit upon a mortgage given by him upon it to Michael Fritz, the defendant James W. McCulloh agreed with him that he would attend the sale and buy it in for him, and protect him against liability on his bond for deficiency, and would allow him one year in which to redeem the property by paying to Mr. McCulloh the amount he might be compelled to advance. Mr. McCulloh, on the other hand, says that there never was any agreement for redemption, but that the arrangement was, that he was to buy the property at the sale for a railroad company which he represented, and of which he was vice-president and general manager; and he says he also told the complainant that he believed he could make some arrangement with Fritz, within the limit of the amount which the company would authorize him to give for the property, to protect the complainant against liability to Fritz for deficiency. The railroad company before referred to, which was the Jersey City and Albany Railway Company, was, with the Ontario and Western Railway Company, of which Mr. McCulloh was a purchasing agent, desirous of obtaining part of the property, a strip of thirty-two hundredths of an acre, for their railroad (right of way), and another part, another strip of five hundred and ninety-four thousandths of an acre, adjoining that just mentioned, for the use of the companies for other purposes; and it was out of the application to purchase such land that the proposition of Mr. McCulloh to buy at the sheriff's sale arose.

The cause must be decided on the weight of the testimony. The complainant and his son David swear positively and distinctly that the defendant offered to attend the sheriff's sale and buy in the property, and protect the complainant against liability to Fritz for deficiency. The complainant's son George testifies, amongst other things, that, near the expiration of the year in

Eckerson v. McCulloh.

which the complainant was to redeem, he called on Mr. McCulloh and requested him to give him a statement of what the property had cost him, and Mr. McCulloh made and gave him one in which he claimed to have paid \$943.08 for the debt and costs, and interest and sheriff's fees. He also says that Mr. McCulloh claimed interest thereon from March 24th, 1881, the day on which the sheriff's sale took place, and that he inquired of Mr. McCulloh what the railroad company would pay for the part of the land it had taken, and Mr. McCulloh named a sum (he says he thinks it was about \$240), and he, the witness, said that that sum was to be allowed his father in the settlement between him and Mr. McCulloh, and the latter said, Yes. Mr. Voorhis, the complainant's solicitor, testifies that shortly before he began this suit, he called on Mr. McCulloh and told him that the year had nearly expired, and said they desired to have the matter closed up, and that Mr. McCulloh said that the complainant had had time within which to redeem the property, but it had expired, and that the property had been sold six months before the time of the conversation, to a railroad company which he named. Mr. Voorhis says he does not know whether it was the West Shore company, or the Ontario and Western. On the other hand, Mr. McCulloh explicitly denies the existence of any agreement to permit the complainant to redeem, and positively asseverates that the agreement was merely that he would buy for the railroad company, and try, in doing so, to protect the complainant against any claim for deficiency; which he says he has done. Mr. De Clark, who was Mr. McCulloh's assistant as purchasing agent, testifies that he was present at some of the conversations which took place before the sale, and that he never heard any agreement, except that which Mr. McCulloh states. But there are some circumstances in the case which tend to show that the agreement was as stated by the complainant and his son David. In the first place, two days after the property was sold by the sheriff, Mr. McCulloh wrote to the complainant that it had been sold, and that he "had had it *bought in* for \$400," and added that that saved sheriff's fees on the difference between that sum and the amount of the decree. He further said that Fritz

Eckerson v. McCulloh.

could not take judgment for the deficiency, but must sue the complainant on the bond, and requested the latter to let him know at once in case Fritz should do that, and added that then the defence of usury could be set up against Fritz effectually; and he concluded by advising the complainant not to talk of the matter, because, by talking, he might find some of his neighbors making him trouble. According to the rule, ten days, at least, must elapse from the time of sale before confirmation. Within that time it appears that the complainant called on Fritz on the subject of the sale, and Fritz advised him to apply to the court to refuse confirmation, on the ground that the property had not brought the best price that could have been obtained for it, in cash, at the sheriff's sale. But Mr. McCulloh advised him to the contrary, and he took his advice. Fritz's lawyer, it would seem, wrote to the complainant the very next day, after the sheriff's sale, in regard to paying the deficiency, and Mr. McCulloh drafted a reply to the letter for the complainant, which was copied and sent. In it the complainant is made to say to the lawyer that he had already heard that he had sacrificed his, the complainant's, property, and, in order that he might make a larger claim on him, had allowed it to be sold to a man who he (the complainant) knew would have given double the amount for which the lawyer had allowed it to be sold; and the letter threatens to defend against the claim for deficiency, on the ground of usury. On the 7th of April Mr. McCulloh wrote to the complainant that he was getting the Fritz claim into good shape, and requested the complainant not to go near Fritz, and adds:

"If he comes after you, make no offer to do more than pay the face of the mortgage."

It appears from this that up to the 7th of April, two weeks after the sheriff's sale, he was aiding the complainant to bring Fritz to terms; and yet he testifies that before the sheriff's sale he "came to an understanding with Fritz that he would pay him whatever sum there might be over and above the amount which he would have to pay at the foreclosure sale up to \$700,"

Eckerson v. McCulloh.

and he adds that the company would not allow him to go beyond that. He further says that Fritz gave him to understand that he was satisfied, and would not attempt to buy the property in at the foreclosure sale. It does not appear that Fritz was not satisfied. Neither he nor his lawyer attended the sheriff's sale, and it does not appear that any bid was made upon the property by or for him. But, further, Mr. McCulloh says that on the 6th of April (the day before he wrote the last-mentioned note to the complainant, stating that he was getting the Fritz matter into good shape), he had, as vice-president, drawn a voucher of the Jersey City and Albany Railway Company for \$300, in favor of Fritz, "for all his interest in the bond and mortgage on the lands of Jacob Eckerson at New Durham, New Jersey, sold at foreclosure sale and bought in for that company under arrangement with him." He says he drew that voucher to assure Fritz that he would get the money, and he adds that he told Fritz he could have the money so soon as he produced the bond and mortgage. The bond and mortgage were brought to him by Fritz on the 22d of April, 1881, and on payment of the \$300 were assigned to Allan McCulloh, Mr. McCulloh's son, to whom the property had been conveyed by the sheriff by Mr. McCulloh's direction. Again, when near the expiration of the year, George Eckerson called on Mr. McCulloh for a statement, with a view to redemption, the latter gave him one by which he claimed to have paid \$943.08, and George Eckerson says he claimed interest on that amount from the time of the sheriff's sale. He had only paid \$700, it appears. Nor, according to the testimony of George Eckerson, did he deny, but admitted, the existence of the agreement to redeem, and the complainant's right to redeem, in pursuance of it. According to Mr. Voorhis's testimony, he admitted that the right had existed, but alleged that the time within which it was to be exercised had expired. The weight of the testimony is in favor of the complainant. But he is not entitled to redeem the whole of the property. The evidence shows that the railroad company was to have the two strips, together containing nine hundred and fourteen thousandths of an acre, at the price of \$250 an acre.

Eckerson v. McCulloh.

It appears from the answer that Allan McCulloh executed a deed dated April 28th, 1881, conveying the property bought at the sheriff's sale to the Jersey City and Albany Railway Company, but it has not been recorded. The answer adds that the rights of that company are now vested in the New York, West Shore and Buffalo Railway Company, but how or by what means is not stated, and the answer claims that therefore the bill is defective for want of necessary parties. It appears by the evidence that the deed just mentioned was executed and delivered by Allan McCulloh to the attorney of the company, to be held by him for the company and subject to its directions, and, for aught that appears, he so holds it still.

In view of the provisions of the seventy-eighth section of the chancery act (*Rev. p. 118*), the bill is not defective for want of parties. That section provides that in any suit for the foreclosure of a mortgage upon, or which may relate to real or personal property in this state, all persons claiming an interest in or an encumbrance or lien upon such property by or through any conveyance, mortgage, assignment, lien or any instrument which by any provision of law could be recorded, registered, entered or filed in any public office of this state, and which shall not be so recorded, registered, entered or filed at the time of the filing of the bill in such suit, shall be bound by the proceedings in such suit, so far as the property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but that such person, upon causing such conveyance, mortgage, assignment, lien, claim or other instrument to be recorded, registered, entered or filed as provided by law, may cause himself to be made a party to such suit. This case is within the provisions of the section. *Wood v. Stover*, 1 *Stew. Eq.* 248. There will be a decree establishing the complainant's right to redeem as to all the property (except the two strips, for the price of which, at \$250 an acre, he is to have credit), on paying the rest of the \$700, with interest from the time when it was paid. And he is entitled to costs.

Hard v. Turnure.

JULIA HARD

v.

ELLEN TURNURE et al.

A non resident testatrix gave all her estate to her husband for life, "and in the event of his decease, and not till then, to be divided between my step-children," John, William, Julia and James, "or their heirs." William died in the testatrix's lifetime, intestate, and having never been married. The property of the testatrix was all personal. By the statute of distributions of William's domicil, his father was entitled to his personal estate.—*Held*, that at testatrix's death, William's father became absolutely entitled to the estate in remainder given to William, notwithstanding the fact that he was, by the will, also entitled to a life estate therein.

Bill for construction of will. On final hearing on pleadings and proofs, and stipulation of solicitors.

Mr. R. Wortendyke and *Mr. J. D. Bedle*, for complainant.

Mr. A. L. McDermott, for defendants.

THE CHANCELLOR.

Eliza Turnure, then wife of William P. Turnure, of the city of New York, died in 1866. By her will made in 1852, in that city, where she then resided, and continued to reside up to the time of her death, she disposed of her property in the following terms :

"I hereby give and bequeath unto my beloved husband, William P. Turnure, all and singular my estate, both real and personal, for his sole use and benefit during his natural life, and in the event of his decease, then, and not till then, to be divided between my step-children, John L. Turnure, William A. Turnure, Julia, wife of Melven Hard, and James H. Turnure, or their heirs."

William A. Turnure died in the lifetime of the testatrix, having never been married. The property of the testatrix was, at

Hard v. Turnure.

her death, all personal. By the statute of distributions of the state of New York, where William A. Turnure lived and died, his father was entitled to his personal estate, in case of his death intestate. The complainant's counsel insist that, on the death of William P. Turnure, the gift to William A. Turnure went to those who, by virtue of the statute of distributions of that state, would have been entitled to his personal estate had he lived until the death of his father, and died intestate immediately after that event. In other words, they insist that the time of ascertaining who the "heirs" in the gift in question are, is not the death of the testatrix, but the death of the life tenant. Under a testamentary gift of personal property to a person, "or his heirs," if the primary legatee die in the lifetime of the testator, the property will go to those who, at the death of the testator, would be entitled to the personal estate of the primary legatee under the statute of distributions. The persons who are to take in such case are to be ascertained with reference to the time of the death of the testator, and not the period of distribution. *Hawk. on Wills 92, 94.* So that in the case under consideration, the father of the primary legatee became entitled, on the death of the testatrix, to the interest given to that legatee, "or his heirs." The counsel of the complainant urge, however, that a proper construction of the gift will exclude the life tenant; because they argue, it is evident, from the language and provisions of the instrument, that the testatrix did not intend that her husband should have anything but the life estate. Generally speaking, where there is a bequest to one for life, and after his death to the testator's next of kin, the next of kin who are to take, are the persons who answered that description at the death of the testator, and not those who answered it at the death of the primary legatee. And it makes no difference that the primary legatee himself is one of those who answer the description, or is the only person who answers it. *Bullock v. Downes, 9 H. of L. 1; Hawk. on Wills 99, 100.* And so, too, of course, where there is a gift to one for life, with remainder to others, or their next of kin, in case of the death of a remainderman in the lifetime of the testator, the persons who are to take as such next of

Banta v. Trustees.

kin are to be ascertained with reference to the time of the death of the testator, and not with reference to the time of distribution. *Hawk. on Wills* 99. An exception is made where there is anything in the context to qualify the language, or in the circumstances, to forbid the acceptance of the words in their ordinary meaning. There is nothing in this case to prevent the application of the rule, or to warrant a departure from it. The mere fact that the life tenant would himself be entitled to the remainder, is not enough to create an exception, and there is nothing else here. The remaindermen, it may be remarked, were not the children of the testatrix, but of her husband, and there is no evidence of any disposition on her part to exclude her husband from any share or shares of the remainder to which he might become entitled by law, through the death of one or more of his children. At the death of the testatrix, the gift in remainder in question vested immediately in the person then entitled under the statute of distributions of New York, to William A. Turnure's personal estate.

WILLIAM S. BANTA et al., executors &c.,

v.

THE BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 3 &c.

A testatrix obtained a decree in a foreclosure suit, and the execution thereon was, by direction of her solicitor, returned unexecuted. After her death an *alias* execution was issued in her name, and, at the sheriff's sale, one of her executors bought the premises, taking the title in his own name for convenience, and in trust for the estate.—*Held*, that a deed executed by himself and his wife, and his co-executor, would transfer a good title to the premises.

Bill for specific performance. On final hearing on pleadings and statement of facts agreed upon by counsel.

Mr. W. Brinkerhoff, for complainants.

Banta v. Trustees.

Mr. A. I. Smith, for defendants.

THE CHANCELLOR.

This suit is brought by William S. Banta and Joshua A. Clark, executors &c. of Maria Berry, deceased, and William S. Banta, individually, to compel performance by the defendants of an agreement for the sale of land in Hudson county, which they purchased of the complainants, through their agent, on the 23d of May, 1884. The defence is, that the complainants have no legal title to the land, and that if they have such title, it is bad in equity, because, as the defendants allege, they, being trustees, purchased the trust property at their own sale thereof.

The title to the property is held by Mr. Banta, who bought it at a sheriff's sale, under an execution issued out of this court on a decree for sale of the property under proceedings in foreclosure of a mortgage held by the testatrix, Maria Berry. He was one of her executors. The suit was begun by her and carried to decree and execution in her lifetime, but the execution was returned unexecuted by order of her solicitor. An *alias* was issued after her death without reviving the suit, and in her name as complainant. The property was sold under it and bought in by Mr. Banta for the executors, and the deed taken by him alone in his individual capacity, for convenience. The complainants have tendered to the defendants not only a deed from him, but another from him and his wife, and still another from him and Mr. Clark, as executors.

The defendants insist that the deed from the sheriff to Mr. Banta is void, because the *alias* execution, under which the property was sold to him, was issued in the name of Maria Berry after her death. The fact, however, does not appear upon the record, and in any suit brought by the mortgagor or his grantees, or any one claiming under him or them, to attack the title, it could not be shown. *Quod non apparet non est*. The title could not be thus attacked collaterally. *Nichols v. Disner*, 5 *Dutch*. 293. The issuing of the execution after Maria Berry's death without revivor was, at most, merely erroneous. *Howard v. Pitt*, 1 *Salk*. 261; *Day v. Sharp*, 4 *Whart*. 339; *Hughes v. Wilkin-*

Banta v. Trustees.

son, 37 Miss. 482; *Darlington v. Speakman*, 9 W. & S. 182. The defendants in the foreclosure suit might have brought the matter to the knowledge of the court before the sale, had they seen fit to do so. But the consequence would have been an immediate amendment by substituting the name of the executors for that of the testatrix. I see no reason whatever for holding that where the execution in a foreclosure suit was issued in the name of the complainant, after his death, that fact is, of itself, sufficient ground for adjudging, and makes it necessary to adjudge, that, for that reason alone, no title passes to the purchaser of the mortgaged premises at a sale under it. If it were so, what stranger would purchase at such a sale? He must, to warrant him in bidding, be assured not only that there is a valid decree, but that when the execution was issued the complainant was alive; not merely that he was believed to be living and that the record shows nothing to the contrary, but that he was so in fact. In an action *in personam*, if the plaintiff die after execution, and before the writ has been executed, the writ does not abate. In sales under foreclosure the execution is issued to execute the decree by sale of the particular property whereupon the lien has been established. The execution is, in fact, the order of the court empowering and directing the sheriff or master to sell that particular property. In partition the court issues no execution; the master sells under the order for sale. If the court had jurisdiction, and was acting within the scope of its powers when it made the decree for foreclosure and sale, that will protect the purchaser. *McCahill v. Equitable Life Ins. Soc.*, 11 C. E. Gr. 531; *Shultz v. Sanders*, 11 Stew. Eq. 154. In this case there was a formal order that the *alias* execution issue. The property was bought in at the sale by the executors (one of them acting for both) for the protection of the estate. The title is good as against the defendants in that suit, and all claiming under them.

The executors were at liberty to purchase at the sale, and, if it was necessary to do so, to protect the estate from loss by sacrifice of the property, it was their duty to do it. *Perry on Trusts* § 458. When Mr. Banta thus bought in the property he held it in trust, in place of the mortgage security from foreclosure of

Gibbs v. Morgan.

which it was derived, and it is to be treated accordingly. It was merely taking the thing pledged for payment of the debt into his hands instead of the debt, through the medium of a judicial sale under foreclosure proceedings. The legal title to the land was by the sale vested in him, and it was conveyed to him by the sheriff accordingly. He held it and still holds it in trust for the estate. He has power to sell and convey it. That power is not derived from the authority to sell given by the will. It is incident to the ownership of the land. To obviate all liability to question, on the ground of the existence of the trust on which he, in fact, holds the property, his co-executor and he, as executors, join in a deed to the defendants. And, in order to prevent all question as to her right of dower in the property, his wife joins with him in a deed to them.

There will be a decree that the defendants perform the agreement.

THEODORE B. GIBBS

v.

ELI B. MORGAN et al.

The constitution of New Jersey prohibits the passing of local or special laws, "creating, increasing or decreasing the percentage or allowance of public officers during the term for which they were elected or appointed," and provides that the legislature shall pass general laws for such cases. An act of 1882 provided that in all counties where the county clerks were *then* paid an annual salary, the deputy should receive \$2,000 per annum, payable quarterly by the collectors of those counties respectively. It appeared that there was but one county in the state where the clerk *then* received an annual salary. The deputy clerk of that county resigned his office ten days before the approval of the act of 1882, and was re-appointed two days after its approval, and his counsel insisted that, consequently, the act of 1882 was not passed "during his term."—*Held*, that, while deputy clerks of counties are "public officers," they have no "term," within this constitutional clause, since their appointments are mere private arrangements with their respective county clerks; and that the act is unconstitutional and void, both as increasing an incumbent's salary, and

Gibbs v. Morgan.

also as regulating the internal affairs of a county by a special or local law; and, further, that the tax-payers of the county are entitled to relief by injunction, since the chosen freeholders of that county persist in paying the deputy clerk the salary under the act, out of the county treasury, and that, too, in monthly payments.

Bill for injunction. On final hearing on pleadings and proofs.

Mr. A. Hugg, for complainant.

Mr. C. G. Garrison, for defendants.

THE CHANCELLOR.

This suit is brought by persons who are citizens and tax-payers of Camden county, against the collector and deputy clerk of that county, to restrain the former from paying to the latter, and the latter from receiving out of the county treasury, salary as deputy clerk, under the act approved March 27th, 1882, entitled "A supplement to an act concerning clerks of counties of this state" (*P. L. of 1882 p. 195*), which provides that in all counties where the county clerks were, at the passage of the act, paid by annual salary, the deputy clerk shall receive the sum of \$2,000 per annum, to be paid to him in quarterly payments by the collectors of those counties respectively. The allegation is that the act is in violation of the constitutional prohibition against passing local or special laws "creating, increasing or decreasing the percentage or allowance of public officers during the term for which they were elected or appointed." *Const. art. IV. § 6 ¶ 11*. By the act of 1874, entitled "An act to regulate the salary of the clerk of the county of Camden" (*P. L. of 1874 p. 280*), it was provided that the clerk of Camden county shall receive from the county, in lieu of fees, for his services as clerk of the criminal and civil courts of the county, a salary of \$4,000 per annum, his fees to go to the county. The act was to take effect at the expiration of the term of office of the then clerk. By act of 1876, entitled "An act concerning clerks of counties in this state" (*P. L. of 1876 p. 289*), it was enacted that the clerk of each of the counties of this state might appoint an assistant in his office, to be known

Gibbs v. Morgan.

and denominated as his "deputy clerk," and gave to such deputy power, during the absence or inability of the clerk, to exercise all his powers and perform all his duties. But it was thereby provided, also, that "no additional compensation shall be paid to the deputy by the county."

The before-mentioned act of 1882, which is entitled a supplement to the last-mentioned act, if valid, in effect partially repeals the provision of the act of 1876, that deputy clerks shall receive "no additional compensation from the county," and gives to the deputy clerks of counties where the clerk is paid by annual salary, a salary of \$2,000 per annum from the county. It is an act giving a salary out of the county treasury to a certain deputy clerk or certain deputy clerks, as the case may be, and the only question to be considered is whether it is a special or local law. Deputy clerks are public officers, but they have no term in the sense in which the expression is used in the paragraph above quoted. They are employees of the county clerks, and their employment is a matter of mere private contract. The law merely constitutes them public officers, and gives them certain powers. It does not establish any particular period of service for them. That is left to private agreement. Since they have no term, in the sense in which the word is used in the constitution, it follows that the constitutional prohibition, when applied to legislation to create or increase their compensation, is unqualified. It must be by general law, and cannot be by local or special enactment. The constitution, it may be remarked, not only prohibits the passage of local or special laws for the purposes specified in the section of which part is above quoted, but directs that the legislature shall pass general laws providing for such cases. *Const. art. IV. § 6 ¶ 11.* The fact that a person is a deputy of a clerk who is paid by annual salary, obviously in itself constitutes no reason for giving him an allowance out of the county treasury, to the exclusion of those who are deputies of clerks paid by fees. The labor and responsibilities of the deputy of a clerk paid by fees and not by salary may be ten times as great as those of the deputy of a clerk paid by salary, and yet, under the act, the latter would get \$2,000 a year from the county, while the former would

Gibbs v. Morgan.

get nothing from that source. The fact that the clerk is paid by a salary is no indication as to the labor and responsibility of his deputy. It constitutes no true basis of classification.

"The true principle," says the chief justice, in *Richards v. Hammer*, 13 Vr. 435, "requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis of classification, must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded, must be such, in the nature of things, as will, in some reasonable degree, at least, account for, or justify, the restriction of the legislation." It is said that the county of Camden is the only one in the state in which the county clerk is paid by salary, and that the act, in fact, applies, and was and must have been intended to apply to that county alone.

It appears that in this case the deputy clerk resigned his office ten days before the approval of the act of 1882, and was re-appointed two days after its approval, and it is urged that the act is not within the constitutional prohibition, because it neither created nor increased his compensation during the term for which he was appointed. This claim has already been disposed of. He had no term within the meaning of the word in the prohibitory provision. The act is unconstitutional.

It may be added that under the views of the court in *Freeholders v. Stevenson*, 17 Vr. 173, the act is within another constitutional prohibition, that which forbids the passage of special or local acts regulating the internal affairs of towns and counties. The tax-payers ought to be protected against such legislation. They can have no relief in the courts of law. The county authorities, unless restrained by this court, will continue to pay the salary which it is alleged has so far been paid, and that, too, in monthly installments, although, by law, it is payable quarterly.

The vice-chancellor, on whose advice the order for the pre-

Demarest v. Vandenberg.

liminary injunction was made, in his "conclusions," suggested that the question of constitutionality be brought to a test in a court of law, and the injunction was modified so as to permit the bringing of such suit, and to allow payment on the judgment. Suit was brought accordingly, but it was permitted to go to judgment wholly undefended.

There will be a decree for a perpetual injunction, without costs.

GARRET DEMAREST, a lunatic, by his guardians,

v.

AALT VANDENBERG.

The complainant was, by a decree of this court, declared to be of unsound mind, and he appears in this suit (to foreclose a mortgage held by him) by guardians of his person and estate duly appointed. The defendant set up usury as a defence, and at the examination offered himself as a witness to prove it.—*Held*, that complainant (and not his guardians, "suing in a representative capacity") was the real party to the suit, and being under a "legal disability," within the meaning of the statute, the defendant was incompetent as a witness, and that the examiner should, under the two hundred and eighteenth rule, have rejected him.

Bill to foreclose. On appeal by complainant from decision of examiner as to competency of witness.

Mr. William Prall, for complainant.

Mr. John W. Griggs, for defendant.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage. The complainant is a person of unsound mind, so declared in this court by inquiry and decree. He appears in this suit by guardians duly appointed under those proceedings. The defendant, in his

Demarest v. Vandenberg.

answer, sets up the defence of usury. On the taking of the testimony before the examiner, he offered himself as a witness to prove the usury. The complainant's counsel objected to his being sworn, on the ground that he was incompetent to testify in his own behalf in the suit, because the complainant was prevented by legal disability from testifying. The examiner overruled the objection, and the complainant appealed from his decision.

The statute of 1859 (*Rev. p. 378 § 3*) did not wholly remove the disqualification of persons to be witnesses in their own behalf in suits or proceedings, by reason of interest in the event as parties. It excepted two classes of cases: one, where the opposite party was "prohibited by any legal disability from being sworn as a witness," and the other, "where either of the parties in the cause was sued in a representative capacity." The act of 1866 (*Rev. p. 378 § 4*) provided that a party to a suit in a representative capacity might be admitted as a witness therein, and if called and admitted as a witness in his own behalf, the opposite

NOTE.—That a defendant is incompetent to testify does not, of itself, render the plaintiff incompetent; as where, in a suit for specific performance of a contract to convey lands, the defendant died, and his heir-at-law, an infant too young to be competent as a witness, was made the defendant, *Dahoney v. Hall*, 20 *Ind.* 264.

The burden of showing the incompetency of a witness rests on the person objecting to his evidence, *Alabama Ins. Co. v. Sledge*, 62 *Ala.* 566; but if a party excluded from testifying by a general rule of law, claims a right to testify under an exception, he must make that right appear at the trial, *White v. Brown*, 67 *Me.* 196.

The statutes of New Hampshire provide that a party to a suit cannot testify where the adverse party is an executor or administrator, and it was held that a party might be a witness, although the adverse party was disabled by his insanity, and the suit was defended by his guardian, *Crawford v. Robie*, 42 *N. H.* 162.

Property levied on under an execution was claimed by a third party. Held, that the plaintiff was competent, although meanwhile the defendant had become insane, *Anderson v. Wilson*, 45 *Ga.* 25.

The guardian of a lunatic is a competent witness in a suit between himself and the lunatic's next of kin, as to his administration of the lunatic's estate, *Turpley v. McWhorter*, 56 *Ga.* 411.

The trustee of a lunatic husband may object to the admission of his wife's

Demarest v. Vandenberg.

party might, in like manner, be admitted as a witness. The act of 1880 (*P. L. of 1880 p. 52*) removed the restriction from the opposite party in cases where one of the parties to the suit sues, or is sued, in a representative capacity, so far as to render such opposite party competent to testify in his own behalf, except as to transactions with, or statements by, the testator or intestate represented in the suit. In cases where one of the parties is under legal disability, which prevents him from testifying, the other party is still incompetent as a witness in his own behalf. Insanity is a legal disability. In some of the states a party is excluded from testifying in his own behalf, where his adversary in the suit is insane, by statute particularly designating that disability by name. Our statute employs a general term embracing it.

It is urged, however, that in this case the complainants are the guardians, who sue in a representative capacity. The suit is brought by the lunatic; but being under disability, he must sue by guardian. *1 Dan. Ch. Pr. 82*; *Norcom v. Rogers, 1 C. E. Gr. 484*; *Dorsheimer v. Roorback, 3 C. E. Gr. 438*. The

testimony, which would otherwise have been competent, *Edwards v. Pitts, 3 Strobb. 140*.

In an action to recover fees as a witness for the plaintiff in an ejectment brought by a lunatic through his committee, the committee is not a competent witness for the plaintiff, but the executor of the lunatic is competent, *Utt v. Long, 6 Watts & Serg. 174*.

Under a statute providing that in an action on a written instrument, the signature of the defendant is taken to be admitted unless he denies its genuineness, the guardian of a lunatic has no power to make such admission, and the lunatic himself cannot answer, *Collins v. Trotter (Mo.), 18 Cent. L. J. 259*.

In some states, parties suing or being sued by the guardian of a lunatic, are excluded by statute, *Austin v. Dunham, 65 Me. 533*; *Little v. Little, 13 Gray 264*; *Kindall v. May, 10 Allen, 59*; see *Garnett v. Garnett, 114 Mass. 379*; *McNicol v. Johnson, 29 Ohio St. 85*.

As to the evidence requisite to prove a party of unsound mind, so as to exclude the adverse party, see *Drew v. Buck, 12 Hun 269*; *McCreight v. Aiken, Rice 56*; *Doud v. Hall, 8 Allen 410*; *People v. New York Hospital, 3 Abb. N. C. 230, note*; *Rhode Island Hospital Trust Co. v. Hazard, 6 Fed. Rep. 119*.

A guardian *ad litem* is not a "guardian" within the meaning of a statute providing that where a guardian is a party, the adverse party shall be incompetent to testify, *McDonald v. McDonald, 24 Ind. 68*; nor does the relationship of a judge of the court to the guardian *ad litem* disqualify him from hear-

Demarest v. Vandenberg.

lunatic is, in this case, the nominal as well as the real complainant. The suit is, in terms, his. But if it had been brought by his guardians alone, it would have been, in fact, his, and he would have been the party complainant within the meaning of the act of 1859.

It is also urged by the defendant's counsel, that a person of unsound mind may be a witness, if found by the court before which he is to testify, to have sufficient capacity; and that hence it may be that the complainant is not disqualified by any legal disability from testifying. That is true; but the question under consideration is whether the case, as it stands, is within the exception made by the statute. If it is, the common law rule governs the matter, and the defendant is incompetent to testify in his own behalf. It has not been made to appear that the complainant has been restored to reason, nor that, although his mental condition is not sound, he nevertheless is competent to testify in his own behalf. He appears, on the record, to be of unsound mind, and therefore under legal disability, and it is to be presumed, *prima facie*, until the con-

ing the cause, *Bryant v. Livermore*, 20 Minn. 313; so, a surrogate may appoint a guardian for an infant, although he is a relative of the guardian, *Underhill v. Dennis*, 9 Paige 202; or his son a committee for a lunatic, *Hopper's Case*, 5 Paige 489.

A guardian *ad litem* is a competent witness for his ward, *Walker v. Thomas*, 2 Dick. 781; *Lupton v. Lupton*, 2 Johns. Ch. 614; and so is a plaintiff against a guardian in socage, *McCray v. McCray*, 12 Abb. Pr. 1; [but see *Lee v. Dill*, 39 Barb. 521]; the wife of such guardian is also competent, *Bonett v. Stowell*, 37 Vt. 258.

The declarations of a guardian in socage against the infant are not admissible for a defendant in a suit by the infant, *Mertz v. Detweiler*, 8 Watts & Serg. 376; *Balt. R. R. v. McDonnell*, 43 Md. 534.

A guardian *ad litem* is not a "party" who may be compelled to answer interrogatories, *Ingram v. Little*, L. R. (11 Q. B. D.) 251.

A next friend is not a party to a suit, and hence may be a surety in replevin for an infant plaintiff, *Anonymous*, 2 Hill (N. Y.) 417.

A statute requiring the next friend of an infant to give security for costs, does not apply to a guardian *ad litem*, *Grantman v. Theall*, 19 Abb. Pr. 308.

A next friend is a "party," within a statute requiring the party to an action to make an affidavit to obtain a change of venue, *Deferd v. State*, 30 Md. 179; or to make an affidavit as to what documents referred to in the bill were in plaintiff's possession, *Crowe v. Bank of Ireland*, L. R. (5 Irish Eq.) 578; but

Demarest v. Vandenberg.

trary is made to appear, that he still continues under that disability. The object of the statute is to guard against the injustice which would arise from a want of mutuality, if one party were permitted to testify in his own behalf, while the other is unable, from legal disability, to exercise the same privilege. It was competent for the defendant to show, if he could, that the complainant was not incapacitated by disability of mental unsoundness from testifying; and if he had done so, he would thus have established his own right to be sworn in his own behalf. He did not do it. He ought, therefore, as the case stood, to have been held to be incompetent. The inquiry is not conclusive as to the existence of the legal disability to testify, but *prima facie* the state of incapacity continues until the contrary appears. It is not necessary for the complainant to show that it, in fact, continues, in order to preclude the defendant. The latter is precluded by the presumed continuance of the state of incapacity until the contrary appears. If it appears, he will be qualified to testify. If it does not appear otherwise, he may show it, if he can.

no order can be made against him as a "party" for the production of documents, *Lawton v. Elwes*, 48 L. T. (N. S.) 425; *Hardwick v. Wright*, 11 Jur. (N. S.) 297; see *Higginson v. Hall*, L. R. (10 Ch. Div.) 235.

As to the status of a next friend, generally, see *Balt. & Ohio R. R. Co. v. Fitzpatrick*, 36 Md. 619; *Leopold v. Myers*, 2 Hilt. 580; *Turner v. Patridge*, 3 P. & W. (Pa.) 172; *Allen v. Roundtree*, 1 Spears 80.

The next friend of an infant or married woman was formerly incompetent, because liable for costs, *Hopkins v. Neal*, 2 Stra. 1026; *Head v. Head*, 3 Atk 511; *Davenport v. Davenport*, 1 S. & S. 101; *Witts v. Campbell*, 12 Ves. 493; *Humes v. Shillington*, 22 Md. 346; *Helms v. Franciscus*, 2 Bland 544; *Pryor v. Ryburn*, 16 Ark. 671; *Hahn v. Van Doren*, 1 E. D. Smith 411; *Colden v. Moore*, 3 Edw. Ch. 311; but is now admissible, *Burwell v. Corbin*, 1 Rand. 131; *Quinn v. Moss*, 12 Sm. & Marsh. 365; *Kilpatrick v. Stozier*, 67 Ga. 247; or may act as an interpreter for the infant, *Swift v. Applebone*, 23 Mich. 252; the next friend's wife is competent, *Dennison v. Spurling*, 1 Stra. 506; even after his death, and the revivor of the suit by his administrator, *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304.

Where a next friend was also surety for the prosecution of the suit, and consequently liable for the costs, it was held that he was a party having "a legal interest which might be affected by the event of the action," and hence incompetent to testify as to any transaction or communication with a deceased party, *Mason v. McCormick*, 75 N. C. 263, 80 N. C. 244.

Demarest v. Vandenberg.

It is suggested that the examiner ought, in such cases as this, notwithstanding the objection, to swear the defendant, and then, on objection, deal with the question of the competency of his testimony as and when offered. But, as matters stood in this case, the defendant was not competent to be a witness in the cause. He was offered as a witness to prove usury—the subject of controversy—to testify upon the merits. The statute provides that a party shall not “be sworn,” where the opposite party is prohibited by any legal disability from being sworn as a witness. By this is meant that he shall not be permitted to testify as to any matter in which he would not be a competent witness at the common law. Had there been an offer to prove by the defendant any matter as to which he would have been competent to testify at the common law, he should have been sworn and permitted to give evidence as to that. But there was no such offer.

It is also said that the two hundred and eighteenth rule of this court gives the examiner no authority to refuse to swear a witness, but only authorizes him to adjudicate upon the competency

A *prochein emy* is not “a party individually named in the record,” so as to be excluded as a witness for his ward, *Sinclair v. Sinclair*, 13 M. & W. 640; *Mellish v. Collier*, 14 Jur. 621.

A guardian is not a competent witness for his ward in an action against a third party, *Clutterbuck v. Huntingtower*, 1 Stra. 506; *Stein v. Robertson*, 30 Ala. 286; but see *McCullough v. McCullough*, 31 Mo. 226; nor, in proceedings between himself and his wards, *Garwood v. Cooper*, 12 Heisk. 101; *Wilson v. Unsell*, 12 Bush 215.

In a suit against a guardian, the administrator of a former guardian is competent for the plaintiff, *Young v. Warne*, 2 Rob. (Va.) 420.

The declarations or admissions of a guardian are not admissible against his ward, *Ewell's Lead. Cas.* 235; 1 *Taylor's Evid.* § 742; also *Wrottesley v. Bendish*, 3 P. Wms. 237; *Walton v. Coulson*, 1 McLean 120; *Bank of United States v. Ritchie*, 8 Pet. 128; *Evans v. Davies*, 39 Ark. 235; *McClay v. Norris*, 9 Ill. 370; *Rhoads v. Rhoads*, 43 Ill. 239; *Turner v. Jenkins*, 79 Ill. 228; *Cavender v. Smith*, 5 Iowa 157; *Prutzman v. Pitesell*, 3 Har. & Johns. 77; *Tucker v. Rean*, 65 Me. 352; *Cooper v. Mayhew*, 40 Mich. 528; *Massie v. Donaldson*, 8 Ohio 377; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499, 535; *Gibbons v. McDermott*, 19 Fla. 852; see, however, *James v. Hatfield*, 1 Stra. 548; *Tenney v. Evans*, 14 N. H. 343; *McCarthy v. McCarthy*, 66 Ind. 128; *Randall v. Turner*, 17 Ohio St. 262; *Walsh v. Walsh*, 116 Mass. 377.—REP.

Kirkpatrick v. Corning.

of his testimony. The rule clearly extends to cases where the witness is incompetent to testify at all. It in terms empowers the examiner to decide upon all objections to evidence. This gives him authority to reject an incompetent witness. To swear a witness who is incompetent to testify, would be a mere idle ceremony. The rule sufficiently provides for the protection of parties in any case by giving an almost immediate appeal to the court itself. The decision of the examiner will be reversed.

ANDREW KIRKPATRICK, receiver &c.,

v.

ERASTUS CORNING et al.

The complainant seeks to redeem certain real estate sold under foreclosure in this court, on equitable terms. All the defendants, except Alice Buckingham and her husband and Susan Horner, demurred to the bill for want of equity. Their demurrer was sustained in this court, but the decree of this court was reversed by the court of errors and appeals, where it was held, as this court had held, that the decree in the foreclosure suit was conclusive on the complainant; but that court held further that complainant might be entitled to relief on the ground of fraud in the sale under that foreclosure. Afterwards, all of the bill, excepting the part relating to that fraud, was stricken out. The defendant Alice Buckingham, who has already answered, now moves for leave to file an amended answer by way of cross-bill against certain of her codefendants, to obtain the relief which it has been held in this case the complainant cannot himself obtain. The original bill neither asks for any relief against her, nor can any be thereby obtained against her.—*Held*, that the application must be refused. A cross-bill is considered as a mode of defence, and must be confined to the subject of the litigation in the original suit, and cannot be the means of instituting a distinct suit in relation to other matters, and cannot become the foundation of a decree as to such matters.

Bill for relief. On motion for leave to file amended answer by way of cross-bill.

Mr. F. B. Candler, of New York, and *Mr. J. M. Buckingham*, of New York, for the motion.

Kirkpatrick v. Corning.

Mr. T. N. McCarter and Mr. Amasa J. Parker, of New York, contra.

THE CHANCELLOR.

By the original bill, the complainant, as receiver of the late firm of James Horner & Co., seeks to redeem certain real property sold under a decree of this court in foreclosure proceedings, on the payment of the sum actually due on the mortgage, after deducting therefrom the fair value of the use and occupation of the premises since the foreclosure sale, and crediting the full value of certain personal property of the firm bought by Corning, the holder of the mortgage, at master's sale held by order of this court; and if that be denied, he prays that the sale under the foreclosure decree may be set aside and a new one ordered, to raise what may be due on the mortgage, after making such credits as the complainant may be equitably entitled to. The facts set forth in the bill are stated in *Kirkpatrick v. Corning*, 10 Stew. Eq. 54. All the defendants, except Alice Buckingham and her husband and Susan Horner, demurred to the bill for want of equity. In this court the demurrer was sustained, but the decree sustaining it was reversed in the court of errors and appeals. *Kirkpatrick v. Corning*, 11 Stew. Eq. 234. In that court it was held, as it had been held here, that the decree in the foreclosure suit was conclusive upon the complainant; but that court held that he might be entitled to relief, on the ground of fraud in or in connection with the sale. On motion in this court, all that part of the bill which related wholly to the former ground of relief (against the decree) was subsequently stricken out. *Kirkpatrick v. Corning*, 12 Stew. Eq. 22. The defendant Alice Buckingham, who has already answered, now moves for leave to file an amended answer, by way of cross-bill, against the defendants, Corning, Ludlum and wife and the Pompton Steel and Iron Company, to obtain, amongst other relief, the very relief against the decree which it was held that the complainant was not entitled to. The foreclosure decree, it may be remarked, is equally conclusive against her as against the complainant, for she was a party to the foreclosure suit. The scope

Kirkpatrick v. Corning.

of the proposed cross-bill will be understood when it is stated that it deals with transactions that took place, as alleged, between Ludlum and James Horner thirty years ago, and ten years before the death of the latter; charges that Ludlum fraudulently induced Horner to make a will in 1871, and a codicil to it in 1873; and, in fact, covers all the matters which have been the subject of litigation between Mrs. Buckingham and Ludlum, and between her and Corning, for years past. Its extent will be seen by reference to its prayers, which are seventeen in number, and are as follows: That the defendants, Corning, Ludlum and wife and the Pompton Steel and Iron Company, may be decreed to be jointly and severally liable to the partnership estate for all the property of that estate which came into the possession of Ludlum as surviving partner and receiver, and which, through his fraudulent acts, came into the possession of the other defendants just named, or either of them, and that they may account to the estate on equitable terms; that it may be decreed that the foreclosure proceedings were and are fraudulent and void as against the partnership estate and as against the interests of Mrs. Buckingham, as heir-at-law and devisee of James Horner, and as his sole executrix, and that the decree of foreclosure may be opened and she be let into possession of the mortgaged premises, on paying the amount, if any, found due on the mortgages on the accounting thereafter prayed for; that she, as devisee and sole executrix, may be permitted to redeem that property on equitable terms; that the master's sale of personal property of the partnership, so far as regards property sold to Ludlum as agent for any one, may be declared void, and that that property sold to him as agent, with all its accumulations, profits and dividends, whether standing in stock in the Pompton Steel and Iron Company, in the name of Corning or others, may be declared to be the property of the partnership; and that the Pompton Steel and Iron Company and Ludlum and Corning may be declared trustees as to that property and those accumulations, profits and dividends, on equitable terms, and to be jointly and severally liable to the partnership estate, as such, therefor, and for all damages to the firm growing out of the mas-

Kirkpatrick v. Corning.

ter's sale; that the Schuyler lease may be declared to be the property of the partnership estate, and be decreed to be conveyed to it upon equitable terms; and, if the right of purchase of the property covered by the firm's lease is lost, that the Pompton Steel and Iron Company, Ludlum and his wife and Corning may be declared trustees of the lease to Mrs. Ludlum for the partnership estate, and to be jointly and severally liable to that estate for all damages which the estate may have suffered by their allowing the firm's lease to lapse; that there may be an accounting with Corning as to what, if anything, is due on the mortgages; that he may be allowed for all moneys advanced by his father to the firm of James Horner & Co., with lawful interest; that in the accounting there be credited to the late partnership of James Horner & Co. all sums paid by them on account of the loans on the mortgages, for bonuses, usury and excessive and unlawful interest prior to June 9th, 1874; that all sums paid on account of the loan by the firm, in cash, whether prior or subsequently to its dissolution, be credited on the mortgages; that all damages and waste suffered by the partnership estate by means of the fraudulent and collusive acts of Corning and Ludlum, may be ascertained under the direction of this court, and be credited on account of any amount found due on the mortgages on the accounting thereon; that the personal property sold at the master's sale to Ludlum, as agent for Corning, and converted into the stock of the Pompton Steel and Iron Company, with all its accumulations, profits and dividends, may be declared to be the property of the partnership estate and credited on the amount, if any, found due on the mortgages on the accounting thereon; that Corning may account to the partnership estate for the rents, issues and profits of the partnership real estate bought in by him at the sale under the foreclosure decree, he to have due allowance for taxes paid and for ordinary and necessary expenses thereon while in his possession; that if, upon the accounting prayed for, anything shall be found due to Corning, he may be decreed, upon payment thereof, to cancel the mortgages of record and reconvey all rights he may have in the property; and that if on the final accounting under the prayers of the bill, the

Kirkpatrick v. Corning.

mortgage debt shall be found to be paid and a balance to be due from Corning, he may be decreed to cancel the mortgages, and that the partnership estate or the receiver may have a decree against him for such balance; and finally there is the general prayer for relief.

On the original bill, as it now stands, after striking out the parts condemned on demurrer, the complainant can have no relief, except the setting aside of the sale of the mortgaged premises and permitting him to redeem the property; the decree standing as establishing the amount due when it was entered; and, perhaps, also, he may have the Schuyler lease transferred on equitable terms. *11 Stew. Eq. 249*. But whatever relief he may be entitled to, he seeks it against Corning, Ludlum and wife, and the Pompton Steel and Iron Company. He seeks none against Mrs. Buckingham; nor can he obtain any against her. Indeed, as was said in this court, and in the court of last resort, in the decision upon the demurrer, this suit is manifestly, in fact, not prosecuted adversely to her, but in her behalf. She has no defence to it. The cross-bill is not to be exhibited against the complainant, but against some of the defendants. It cannot be allowed, unless it is necessary, in order to obtain discovery, or to get relief on some collateral claim or opposite interest of hers, which she should be permitted to litigate, in order that this court may have before it all the matters material to the making of a decree in the original suit upon the subject-matter of that suit. *Mitf. Pl. 83*. She seeks by this bill to litigate no matter necessary to her defence as against the relief sought by the original bill, but seeks an opportunity by this means, not only to supplement and re-inforce that bill in aid of the complainant, by setting up substantially the same matters which have been stricken out, but also to obtain relief for herself outside of the subject of that bill, by setting up matters outside of those stated therein. As to all such latter matters, the proposed cross-bill is an original bill, and no decree thereon can be made in this suit. It is too plain for discussion that the proposed bill is entirely at variance with the established rules of correct pleading and practice in reference to exhibiting cross-bills. A cross-bill is considered as

Osmun v. Porter.

a mode of defence, and it must be confined to the subject of litigation in the original suit. It cannot be the means of instituting a distinct suit in relation to other matters, and cannot become the foundation of a decree as to such matters. *Mitf. Pl. 81*; *Story's Eq. Pl. § 631*; *1 Hoff. Ch. Pr. 346*. *Galatian v. Erwin, Hopk. 48*, furnishes an illustration. There the original suit was for foreclosure of two mortgages. By cross-bill one of the defendants in her defence sought to impeach, for fraud, the title of the mortgagor, not only to the mortgaged premises but to other lands, the title to which he obtained at the same time through the same means—a sale in proceedings for partition. It was held that, as a defence to the original suit, the cross-bill was entirely proper, but that it could not introduce a distinct suit relative to the other lands, or become the foundation of a decree concerning matters not embraced in the original suit; and that no decree beyond the subjects of controversy in the original suit could be made in the cause. See, also, *S. C., 8 Cow. 361*, and *Cross v. Del Valle, 1 Wall. 1*.

The leave applied for will be denied, with costs.

ELIZABETH A. OSMUN

v.

RUTH P. C. PORTER.

After directing that his debts be paid, and making a specific devise, a testator gave the "balance and residue" of his estate to his wife, declaring that that gift to her was in lieu of her dower. In the settlement of the estate, and the payment of testator's debts, all his personal estate was exhausted, and all his lands, other than those specifically devised, sold, by order of the orphans court.—*Held*, that his widow was not deprived of her right of dower in those other lands by her failure to file her dissent to the devise to her within the time limited by the statute.

Bill for dower. On final hearing on pleadings and proofs.

Osmun v. Porter.

Mr. John Linn, for complainant.

Mr. J. G. Shipman, for defendant.

THE CHANCELLOR.

The complainant, Elizabeth A. Osmun, widow of Eli W. Osmun, deceased, files her bill for dower in real property—a house and lot called the Hackettstown Gazette property, in Hackettstown, of which her husband died seized. By his will, after directing that his debts be paid, he gave to his mother \$1,000 and a house and lot in Willow Grove street, in Hackettstown, for life, with limitation over to his father if he should survive her, and remainder to his own children in fee, and then gave the “balance and residue” of his estate to his wife, declaring that that gift to her was in lieu of dower. He died November 19th, 1877. The complainant, supposing that the residue would be of very considerable value, did not decline to accept the provision in lieu of her dower. In the settlement of the estate it became necessary, in order to pay the debts, to sell all the real estate not specifically devised, and there is no balance or residue for her. She, in fact, receives nothing under the will. She and her husband’s father were appointed executors. Both proved the will, and they nominally acted together (but the business seems to have been done by him, she being unacquainted with such matters), until they were both discharged, on their own petition, on the 18th of February, 1879, and an administrator with the will annexed, appointed. She, on the 7th of October, 1878, filed a petition against her co-executor, alleging that he had had all the funds of the estate and she none; that he was, as she had been informed, using the funds for his private purposes; that he was insolvent; that he had advertised the real estate for sale in his and her names, but without her consent, and that the estate was in danger of being wasted in his hands, and she therefore prayed that he might be required to give security.

Under the petition he was cited to account. In December term, 1878, they were, on their own petition, both discharged, as before mentioned. The complainant accounted. There was a

Osmun v. Porter.

balance of \$49.80 against her, which she paid to the administrator. Her co-executor also accounted, and there was a balance against him of \$636.02, which he paid to the administrator. On the final settlement by the latter there was a balance in favor of the estate of between \$200 and \$300, which was paid over to the testator's mother on account of her legacy. The property in which the complainant claims dower was sold by the administrator, under the order of the orphans court of Warren county, to the defendant, December 1st, 1879, for \$3,151, subject to two mortgages thereon. The defendant insists that the complainant is barred of any claim of dower in it, because she did not decline to receive the gift of residue in the will in lieu of dower, and also because there was, as the defendant alleges, a balance or residue of the estate which was wasted by the mismanagement of the executors, or one of them. As to the first defence: It is provided by statute that if a husband devise to his wife, by will duly executed to pass real estate, any lands or real estate for her life or otherwise, and without expressing whether such devise is intended to be in lieu or bar of dower or not, and she survives him, she shall not be entitled to dower in any land or real estate devised by him, unless she shall, in writing, dissent to receive the lands or real estate so devised to her in satisfaction and bar of her right of dower in the other lands and real estate devised in and by the will, and file the dissent with the surrogate of the county in which she resides, or in which the lands or real estate devised to her shall be situated, within six months after the probate of the will, and in that case she shall be considered as renouncing the benefit of the devise to her. *Rev. p. 322 § 16.* It has been held that, in such case, although the widow has not expressed her dissent within the time limited, if she be subsequently evicted from the devised premises, without her fault, by title paramount, or legal sale for the testator's debts, she will not be barred of her dower. *Thompson v. Eybert, 2 Harr. 459.*

It will be seen that what the statute deals with is the right to dower *in other lands devised by the will.* It was held in the case just cited that it would not be lost by failure to dissent within the specified time if it should afterwards turn out that the pro-

Osmun v. Porter.

vision made in lieu of dower had failed. The ground of the decision is, that it must be held that the testator did not intend that, under such circumstances, the widow should be barred of her dower. That is, that it must be held that he intended that she should have the land devised to her in lieu of her dower, and that in consideration of receiving that provision she should be barred, and that it cannot be supposed that he intended that she should lose her dower if that provision should fail without fault on her part by the successful assertion of paramount title, or through sale for the payment of his debts. In the case in hand the question is, not whether the widow shall have her dower *in any other land devised*, but whether she shall have it in *the very land devised to her in lieu of dower* when that land is sold away to pay his debts. There is obviously no ground for denying her right.

The second ground of defence is, that the complainant and her co-executor, or one of them, have wasted the estate. There is no evidence to support this charge. Both executors have accounted, and their accounts have been duly passed with the result before mentioned in reference to the balances thereupon, which, as before stated, they have paid. The sale was, as already stated, made by the administrator under an order of the orphans court. The purchaser had notice, in fact, before the sale was confirmed, of the existence of the complainant's claim of dower. Her attorney, who attended the sale and bought the property for her, called upon the complainant in reference to it, and, according to his own testimony, on her saying that she intended to claim whatever rights she might have in the property, threatened to file a bill in this court immediately, to quiet the title. According to Mr. Johnson's testimony, he said that if she claimed dower he proposed to go to the chancellor and get the sale set aside, or get an order from the chancellor for the payment of her dower out of the money of the estate.

The administrator testifies that the attorney asked him to notify him of the time when he was going to ask the orphans court to confirm the sale, so that he might have an opportunity to object to the confirmation, on the ground that the widow had

Osmun v. Porter.

a dower right in the property. But the purchaser neither opposed the confirmation (although she had opportunity to do so), nor took any proceedings in this court.

The property, according to the evidence, is and was, when the sale took place, worth about \$10,000. It was struck off to the defendant at \$3,151, the complainant's father having bid \$3,050. It consists of two parcels, one fifty feet wide and the other five. The former parcel was subject to two mortgages (both given by the testator and the complainant), one for \$1,500 of principal, and the other apparently now for \$2,000 of principal, although the answer says that \$1,600 of principal have been paid upon it (it was originally for \$3,500)—altogether \$3,500 of principal. There does not appear to have been any encumbrance on the five feet. The defendant has obtained an assignment of those mortgages with the intention (according to her answer) of keeping them alive for the purpose of protecting her title against the complainant's claim.

No offer to redeem was made before the suit was brought, but in the course of the testimony an offer was made, on behalf of the complainant, to take the property off the defendant's hands at the price she paid for it, including of course what she paid for the mortgages, with interest, after a proper accounting in respect to the rents.

The sale took place, as before stated, December 1st, 1879. It was confirmed on the 22d of that month, and the conveyance by the administrator to the defendant was made January 2d, 1880. The bill was filed April 23d, 1880. One of the mortgages was acquired by the defendant March 25th, 1880, before the beginning of the suit, and the other May 3d, 1880, after the filing of the bill and after the service of the subpoena to answer.

The complainant is entitled to dower in the property from the date of the administrator's deed, but must contribute her due proportion to the payment of the mortgage encumbrances, which will be a sum of money bearing the same proportion to the amount of those encumbrances that the value of her life estate in one-third of the property bears to the value of the whole property. *Chiswell v. Morris*, 1 *McCart*. 101.

Houston v. Houston.

I am unable to find any evidence that the complainant made any demand of her dower before bringing suit. She alleges in her bill that she made one, but the defendant denies it. The latter, however, has put in as an exhibit, on her part (but without any proof whatever in reference to it), what purports to be a written demand of dower by the complainant. It is a simple demand of dower in the property, not accompanied by any offer to contribute to the discharge of the mortgages. Each party will pay her own costs.

SAMUEL HOUSTON

v.

MARY J. HOUSTON et al.

A decedent left no property, except a lot with an unfinished house thereon, which his widow occupied for about three months after his death, and then leased, and received the rent. In a suit by the children for partition thereof—*Held*, that she was entitled to re-imbursement of moneys paid by her for taxes thereon, and also for repairs of damage to the house by a tempest, but not for the premiums on insurance policies taken in her own name, and that she must account for the rents.

Bill for partition. On final hearing on pleadings and proofs.*Mr. Warne Smyth*, for complainant.*Mr. J. S. Mabon*, for the widow.

THE CHANCELLOR.

This is a suit for partition of premises (two building lots in West Hoboken) of which Thomas Houston died seized in 1871. On the property at his death, there was an unfinished dwelling-house. The first floor was only partly finished, and the other not at all. The widow of Mr. Houston, by her answer by way

Houston v. Houston.

of cross-bill, claims re-imbursement for principal and interest paid by her since her husband's death, upon a mortgage which was upon the property in his lifetime, and for taxes and insurance premiums paid, and repairs done by her upon the premises since his decease. Her dower has never been assigned to her. It would seem that her husband left no other property. * It appears, by the evidence, that she stayed in the house for about three months immediately succeeding his decease, and then left it, and that since that time she has received but \$10 for rent. The premises have always been untenable, by reason of their unfinished condition. She does not appear to have assumed to hold possession as widow. She left the property because it was untenable. The persons whom she put in, were put in as caretakers rather than as tenants. They were persons of whom but little, if any, rent could be got. The injury (by tempest) which rendered the repairs necessary, did not take place until 1880, nearly nine years after the death of her husband. She is, under the circumstances, entitled to be repaid the principal and interest paid by her upon the mortgage, and also the money paid for taxes and repairs. The repairs were to the roof and chimney. The former was blown off, and the latter blown down, and she put on a new roof, and rebuilt the chimney. She is not entitled to allowance for the lath which she furnished towards finishing the building. They were not used for the purpose, nor in the building at all. Nor is she entitled to allowance for the insurance premiums. The policies were taken out in her own name. She must account for the rent actually received. What she did in reference to the property, was evidently done for the purpose of taking care of it for herself and the children, and she ought not to be dealt with as a widow holding possession of the property until her dower should have been assigned, but as a person who, being interested in the property, has taken care of it for the benefit of all.

Cane v. Cane.

FREDERICK W. CANE

v.

CATHARINE A. CANE.

1. A visit by a married woman to a brothel, will, unless satisfactorily explained, justify the presumption that she went there for a criminal purpose.

2. Such conduct will not, however, afford evidence of guilt if it is shown that the wife was decoyed there, by the procurement of her husband, and for the purpose of making a case against her.

3. A husband who seduces his wife before marriage, and, after marriage, sees her in a situation of temptation and does nothing to rescue her, and she yields, will be understood as having consented to her adultery.

On final hearing on petition and answer and proofs taken in open court.

Mr. John Linn, for husband.

Mr. Gilbert Collins, for wife.

VAN FLEET, V. C.

These parties are before the court in cross-suits. Each seeks a divorce from the other on the ground of adultery. They were married in June, 1867. For some time prior to their marriage they lived together as husband and wife, falsely representing to their parents that they had been married. A child was born to them out of wedlock. After their marriage, the husband took his wife and their child to the home of his parents in Jersey City, where they continued to live, as part of his father's family, until June, 1880, when the husband rented a house at Rutherford, and removed his wife and their five children to it. He did not go there to live himself, but remained in Jersey City, visiting his family at Rutherford irregularly, sometimes once a week, and at others at longer intervals, and for some months immediately before the commencement of his suit he ceased his visits

Cane v. Cane.

altogether. Prior to June, 1880, the husband says he suspected the fidelity of his wife; the conviction of her guilt, he says, had forced itself upon him to such an extent that his life had become a burden to him, but he admits that the evidence which convinced him was not such as would have convinced a court of justice, and he therefore put a watch upon his wife, to see if sufficient evidence could not be discovered to convict her of adultery. The evidence against the wife comes entirely from the mouths of those spies whom he employed, for money, to obtain evidence to convict her of adultery.

There can be no doubt whatever that one of the husband's objects in removing his family to Rutherford was to place his wife in a situation where she might be constantly exposed to the most vigilant espionage. But this was not his only object. The evidence leaves no doubt on my mind that he wanted his wife to commit some offence against her conjugal duty, which would enable him to get rid of her, and that if her evil propensities would not lead her into actual crime, he was willing that she should be lured into such a course of conduct as would warrant the legal presumption that she had committed adultery. The case made against the wife is of the latter sort. There is no proof of actual guilt, but the proof against her consists entirely of

NOTE.—That a married woman goes to a brothel, is *prima facie* evidence of adultery, *Best v. Best*, 1 *Add.* 411; *Kenrick v. Kenrick*, 4 *Hagg.* 137; *Woods v. Woods*, 4 *Hagg.* 138, *note*; but may be explained, *Betts v. Betts*, 1 *Johns. Ch.* 197; and so as to going to a hotel, *Pond v. Pond*, 132 *Mass.* 219; so, where a married man enters such a house in the evening, and remains all night, *Evans v. Evans*, 41 *Cal.* 103; *Van Epps v. Van Epps*, 6 *Barb.* 320, 322; *Langstaff v. Langstaff*, *Wright* 148; or is proved to have been shut up in a room alone with an unchaste woman, *Daily v. Daily*, 64 *Ill.* 329; see *Lockyer v. Lockyer*, 1 *Edm. S. C.* 107; *Hunn v. Hunn*, 1 *T. & C. (N. Y.)* 499; *Richardson v. Richardson*, 4 *Port.* 467; but his conduct, in going to a brothel, may be explained, *Platt v. Platt*, 5 *Daly* 295; *Latham v. Latham*, 30 *Gratt.* 307; as to explanations of a married man's associating with prostitutes for benevolent purposes, see, *Ciacci v. Ciacci*, 26 *Eng. L. & Eq.* 604.

As to a husband's conduct, encouraging his wife to commit adultery, in order that he may obtain a divorce therefor, see *Timmings v. Timmings*, 3 *Hagg.* 76; *Pierce v. Pierce*, 3 *Pick.* 299; *Cochran v. Cochran*, 35 *Iowa* 477; see, further, 14 *Cent. L. J.* 162.—REP.

Cane v. Cane.

proximate acts or conduct. But the case thus made, if it can be believed that her conduct was not the result of procurement, but was the natural expression of her depraved affections, is sufficient to justify a decree of divorce.

Before proceeding to consider the evidence against the wife, it should be stated that she is charged with having committed adultery with eight different men between February 10th, 1881, and October 9th, 1882. Six of the eight are described as unknown. Nine different spies or detectives have, at different times, during a period of two and a half or three years prior to the institution of this suit, been employed to watch her, to see if evidence of guilt could not be obtained against her. Her life, almost constantly during that period, has been subject to a close surveillance, by persons naturally eager to discover what they were hired to find. The period covered by the espionage, as well as the number and character of the persons employed to make it, shows a persistency on the part of the husband which evinces either that he was firmly persuaded of his wife's guilt, or that he had made a desperate resolve that a case should be made against her, though she was pure and guiltless. His efforts to discover evidence of guilt were of a character which should excite the most jealous vigilance of the court. A person employed for money to discover evidence to establish any fact, is naturally eager to attain his object, and whether such be the arrangement in fact or not, he is very likely to believe, especially in a case like this, where his employer has the deepest interest in his success, that his reward will to a very large extent depend upon the success of his efforts; while evidence emanating from such a source cannot be rejected as unworthy of credit, it is manifest, that the security of the citizen, and the safe administration of justice, both demand that the court should examine it with the utmost caution, and never act upon it until it has been tried by the most vigorous tests.

The only proof against the wife which lays the slightest foundation for a judgment of divorce, is that which shows that she visited two different brothels, and made two visits to a bed-house, or a place kept for illicit sexual intercourse. There is no

Cane v. Cane.

other evidence in the case which warrants even a suspicion that she has been unfaithful to her husband. It is proved, however, that on the afternoon of July 8th, 1882, she was seen, in company with another woman, to enter a house of ill-fame in East Twelfth street, New York city, and also that she was seen, on the afternoon of August 20th, 1882, to enter a brothel on East Twenty-third street, in company with the same woman and an unknown man; and also, that on the afternoon of August 3d, 1882, and again, on the 17th of the same month, she was seen in company with the same woman, and two unknown men, to enter the West End Hotel, on Eighth avenue, in the city of New York. The last place, it is proved, is used as a bed-house as well as a hotel. Unless Mrs. Cane's visits to these places have been satisfactorily explained, there can be no doubt about what effect they must have against her as evidence of guilt. If she went to them fully understanding their character, and with full knowledge of the purposes for which they were used, attended by a man not her husband, it would require very strong evidence to convince any man at all familiar with human conduct that her visits were not made for a criminal purpose. Lord Stowell said, in *Williams v. Williams*, 4 Eng. Ec. 416 (1 Hagg. Con. 299), that it was almost impossible to believe that a woman would go to a brothel for any but a criminal purpose; and, therefore, in his opinion, it had been properly held that such conduct on the part of a wife furnished sufficient evidence of adultery to justify a decree that she was guilty. And Dr. Lushington, in *Astley v. Astley*, 3 Eng. Ec. 303 (1 Hagg. Con. 714), held that such conduct on the part of a wife must constrain a court to conclude that she had committed adultery. Undoubtedly, such conduct is always open to explanation, and if the wife can show that her visits were for an innocent purpose, or the result of accident, they will then, of course, furnish no evidence of guilt; and so, too, if it should be shown that the wife was decoyed to them, through the procurement of the husband, then, instead of furnishing evidence of guilt against her, they would show that the husband was trying to deceive the court, and to induce it, by false appearances, to pronounce an unjust judgment.

Cane v. Cane.

The important question of the case then is, Have these visits been satisfactorily explained, so as to show that they do not justify the presumption of guilt? It will be remembered that Mrs. Cane made none of them alone, and that all of them were made in the light of day. She was always accompanied by one or more persons. On the first she was accompanied by a woman, on the second by the same woman and an unknown man, and on the last two by the same woman and two unknown men. Neither of those persons has been called as a witness. The husband has made no effort whatever to get their testimony. He has intentionally refrained from effort in that direction. The wife, on the contrary, has made the most strenuous efforts her means would enable her to make, to find the woman, but without success. The only evidence before the court, showing the circumstances under which the visits were made, and what occurred while Mrs. Cane was within the walls of either house, comes from her mouth alone. Her evidence on these points is full to exhaustion. She was searchingly cross-examined; her answers were full and frank; she evaded nothing and withheld nothing, but exposed everything, without the least reserve, just as it rested in her memory. If her evidence is true, she is not only guiltless, but the victim of a most wicked and perfidious conspiracy.

Among the spies employed by Mr. Cane to watch his wife, was one named Edward Scott. Mr. Cane says he made Scott's acquaintance at the office of his counsel, in February, 1882, and after that, from March until the following August or September, he was constantly in Mr. Cane's employ. Scott took up his residence in Rutherford about the 1st of May, 1882, under the name of Edward Williams. He pretended to be a broker, engaged in business in New York city. When he appeared at Rutherford, he was accompanied by a woman whom he represented to be his wife. They pretended that they had been married shortly before. The woman was not his wife. He had a wife living in the city of New York, whom he had deserted, together with his infant child. Soon after Scott and this woman appeared at Rutherford, they commenced attending the church

Cane v. Cane.

of which Mrs. Cane was a member. They made her acquaintance, and very shortly thereafter they asked her to take them as boarders. She consented to do so, and they became members of her family the latter part of June, 1882. The woman, by her kindness, soon won Mrs. Cane's confidence. She employed Mrs. Cane to do needle-work for her, and took her to New York when she went shopping, and it was while they were in the city on shopping excursions that Mrs. Cane was inveigled into these disreputable places, her visits to which, it is now insisted, furnish evidence of guilt. The means by which she was lured into these places need not be described. It is enough to say that she swears that she did not know or suspect that they were immoral places, but, on the contrary, believed that they were perfectly reputable places, where she might go without the least danger to her reputation; and that she went to each with the pretended Mrs. Williams, at Mrs. Williams's request, and for what she believed, at the time, was a real, as well as a perfectly innocent purpose. She further swears that Mrs. Williams represented to her that the men who accompanied them were either relatives of hers, or very warm friends of her husband, and that not only is she guiltless of any criminal conduct with either of these men, but that at no time while they were in her presence was there anything in the conduct of either which led her to doubt, for one moment, their decency or respectability.

The truth of these statements stands not only uncontradicted, but I think that it receives strong confirmation from Mr. Cane's own conduct. Scott was his agent. He says he employed Scott to watch his wife, to see where she went, and to find out what she did, but that he did not employ the woman, and did not know her. But he admits that he saw Scott two or three times in July, and about the same number of times in August. These were the months, it will be remembered, in which the visits were made, the first being made on the 8th of July, and the last on the 20th of August. He further admits that he knew in advance, from information furnished by Scott, when each visit was to be made, and to what particular place his wife would go. His information respecting the movements of his wife, was so

Cane v. Cane.

precise that he could tell his employer, while they were both in Jersey City, just what house in New York his wife would enter. He was in New York on the 8th of July, in company with two of his employees, and saw Mrs. Cane, accompanied by another female, enter a brothel on Twelfth street. He watched that particular house at that time, because Scott had told him that his wife would go there. Scott was not there. He was never present when Mrs. Cane entered any of these places. Although he was employed to watch her, and see where she went, and to find out what she did, and although he knew long enough in advance where she was going, to have time to notify Mr. Cane, so that he or his employee could be present when she arrived, yet he was always absent himself. Why was he absent? Why did Mr. Cane allow him to be absent? If Mr. Cane simply wanted to know the truth, if he was conscientiously trying to find out whether or not his wife was pure, but did not want a case forged against her, his natural course, as it seems to me, would have been, when Scott informed him that his wife would visit a certain brothel, on a particular day, for him not only to have required Scott to be present where he could see the visit made, but to have required Scott to disclose to him the sources of his information. Scott, it will be remembered, had foretold each visit, just when and where it would be made. Where and how did Scott get his information? Did not Mr. Cane want to know? His suspicions had made his life a burden to him. He is now told that his wife is about to furnish, by her own conduct, strong evidence of the truth of his suspicions. Such information would naturally deeply interest him; it could not fail to excite his curiosity, and make him intensely eager to know all that his informant knew. Assignations for adulterous purposes are always secret. Did it not strike Mr. Cane as startlingly strange that Scott should know, in advance, to just what brothel Mrs. Cane was going? Yet he made no inquiry. It would appear that he had no curiosity; he was indifferent and unconcerned in a situation where most other men would have been subject to a greedy and prying curiosity. This conduct is so unnatural, so contrary to the way the great mass of mankind

* Cane v. Cane.

would act, in like circumstances, that it can be understood in but one way. He sought no further information, because he already knew all he desired to. If he knew that Scott was trying to entice Mrs. Cane into crime, or attempting to lure her into a course of conduct which would justify the presumption of guilt, he would naturally be incurious, for then the less he knew about the means that Scott used to effect his purpose, the better would be his chances of accomplishing his ultimate object. Now, it is proper to say, in this connection, that Mr. Cane says he did, on one occasion, seek information of Scott. He says the first time he saw Scott in July, Scott told him that he had hopes that he would be able to catch his wife, but that he did not state the grounds of his hopes; that he asked him why he thought he would be able to catch her, and that Scott replied: "You must trust me; I want to undertake to do what I undertake myself, and you will find I will do right by you." But there his curiosity ended. Subsequently, when Scott told him his wife would visit a certain brothel on a particular day, though the information was of the kind he had been searching for eagerly, but unsuccessfully, for nearly two years, and though the information was of a character which, if true, furnished him just ground to hope that he would soon be able to break a bond which made his life wretched and miserable, still it was not sufficient to provoke his curiosity. He does not appear to have desired to know to whose embraces his wife intended to surrender herself, nor whether she was going to the brothel for the purpose of prostitution, or was to be decoyed there by a stratagem of Scott's.

It is barely possible that a man of an extremely distrustful nature, or morbidly jealous, who suspects the purity of his wife, might, when first informed that evidence of his wife's guilt can be obtained, act with great rashness; he might not, in his eagerness to confirm his suspicions, stop to consider, or even to think, but after he believes his object is gained, and that he has sufficient evidence to establish her guilt, he will then naturally become considerate and inquisitive, and if he is told subsequently further proofs can be obtained, he will be very likely to treat

Cane v. Cane.

such information very much as he regards the virtue of his wife—a thing not to be believed in, unless no reason, real or fancied, can be found to doubt it. Mr. Cane did not act in this way. He never seems to have been curious or suspicious about anything but the virtue of his wife, though it must have been manifest to him that Scott was either decoying his wife into a course of conduct which, though she was innocent, would make her appear to be guilty, or that Scott possessed some occult means of discovering secrets.

There is another part of Mr. Cane's conduct which, I think, furnishes very strong evidence that he knew that Scott was trying either to lead his wife into guilt or to surround her with the appearances of guilt. He knew, as already stated, that his wife, on each occasion when he says she was guilty of conduct indicating a criminal intent, was accompanied by another woman. He saw them enter the brothel together at the time of their first visit. He knew the other woman by sight, and also that she lived at Rutherford. So he told his spy, William Schenck. He says, it is true, that he did not find out until August or September, 1882, that Scott was boarding at Mrs. Cane's house, but he admits that he was then told that there was a woman there with Scott. But it is impossible to believe that he is not mistaken as to the time when he was first told that Scott and this woman had become members of his wife's family. For a year prior to the time they went there, his wife and her household had been constantly subject to the most vigilant watch, and it cannot be believed that two persons, one of whom was a man, could have been added to his wife's family without that fact coming to his knowledge at an earlier time than he states. It is highly probable, in view of all the circumstances, that they had not been there a week before he knew it, and I think it may well be doubted whether he did not know they were going there before they went. But suppose we assume it to be true that he did not hear until he says he did, that they were members of his wife's family, it is undisputed that he knew on the 8th of July, and also on the occasion of each subsequent visit, that his wife did not go alone to these immoral places, as she would most probably

Cane v. Cane.

have done if her purpose had been criminal, but was always accompanied by another woman, whom he knew by sight, and also where she resided. Where and how did he get his knowledge of her identity, and of the place of her residence? And when he learned this much respecting her, did he stop? Did he prosecute his investigations no further? If his wife was criminal, this woman was her associate in crime. Any evidence affecting the one would have equal force against the other. He knew where this woman lived; it was easy, therefore, for him to have found out who and what she was, what roof sheltered her, and whose wife she claimed to be. A very slight investigation—a simple visit to his wife and children—would have furnished him with full information that Scott had an associate in his undertaking. It must be remembered that he was desperately eager to procure evidence against his wife. His conviction that she had dishonored his bed was so strong as to embitter his life. Now, with such clues to guide him in his search, it is impossible to believe that he did not follow them to their uttermost extent, unless it is also believed that he had been forewarned that his case was one in which it might be dangerous for him to know too much, or to be too zealous or too inquisitive.

But the most decisive evidence furnished by Mr. Cane's conduct remains to be considered. He discharged Scott in August, 1882. He says that he does not know that he expected to see Scott again. Scott was going to Boston. He says he said to Scott, when they parted, that he might have no occasion to see him again, and that Scott told him if he did he should write to him at the Parker or Palmer House, Boston. He has never written to him. He says two or three months before he was examined as a witness in this case, he looked for Scott in New York, but the manner in which he says he conducted his search, as well as his whole conduct towards this man Scott, shows conclusively that he did not want him as a witness. And yet Scott, if his case was an honest one, was unquestionably his most valuable and important witness. The same means by which Scott learned when the visits were to be made, undoubtedly also informed him with whom and for what purpose they were to be made. Mr.

Cane v. Cane.

Cane was struggling to free himself from a bond which made his life a burden to him. In such a contest he was not likely to lose sight of any of his advantages, nor to cast aside his most trusty and efficient weapon. It is impossible to believe that either Mr. Cane or his counsel did not see and appreciate the importance and value of Scott's evidence. But no effort was made either to secure him as a witness or to procure his evidence subsequently. As the proofs now stand, it is shown that every circumstance indicating guilt surrounding Mrs. Cane was the work of Scott. Can it be doubted that the reason that Mr. Cane did not want Scott as a witness was because he knew too much? But more, if Mrs. Cane visited these places for a criminal purpose, it was easy for Mr. Cane to prove it. The woman who accompanied her on each occasion was Scott's accomplice, and knew just how Mrs. Cane was induced to go to these places. Mr. Cane has made no effort to obtain the testimony of this woman. The reason is obvious.

The case against the wife utterly fails. If it were stronger, indeed if guilt was shown, still I think it would be the duty of the court to deny the prayer of the husband in view of his conduct. A husband who seduced his wife before marriage, and thus makes himself acquainted with her weakness, and, what is more, responsible for the loss of that strength of character which conscious purity always gives a woman, places himself in a position where the law, in consequence of his wrong, requires him to shield his wife with peculiar vigilance, and to see to it that she is not exposed to temptations that he knows she cannot withstand. If such a husband sees his wife in danger, if he sees her in a position where she is likely to become subject to the power of the blandishments of a man whose character he knows to be bad and intentions evil, and he does nothing to warn her, or to withdraw her from his influence, but allows her to be led on to her ruin and his dishonor, his conduct, in law, amounts to consent, and the statute declares that no divorce for adultery shall be decreed when it appears that the party complaining consented thereto. Chancellor Zabriskie declared in *Hedden v. Hedden*, 6 C. E. Gr. 61, that if a husband sees what a reasonable man

Cane v. Cane.

could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial incontinence, or if he has himself seduced her before marriage, whereby he is put upon his guard respecting her weakness, he is called upon to exercise peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result.

The petition of the husband must be dismissed, with costs. An additional counsel fee will be allowed. The defence has been attended with unusual labor and difficulty. This has been so in consequence of the artful manner in which circumstances indicating guilt have been thrown around the wife. \$150 has already been allowed; \$500 is, under the circumstances, a very moderate allowance. An additional allowance of \$350 will be made.

In the suit by the wife against her husband, though several adulterous acts are charged, but one is proved. That is proved by a single witness, and if it was committed at all, was committed in the summer of 1869, more than fifteen years ago. The proof in support of the charge is very unsatisfactory. The witness who swears to the act admits that when inquiry was first made of him, he did not recollect the fact; that it had entirely faded from his memory, and that it was not until he had made an effort that his recollection of the fact returned. Standing alone and uncontradicted, I think it might well be doubted whether the measure of proof thus furnished would be sufficient, in any case, to justify a judgment of divorce. The husband and his alleged *particeps criminis*, however, both deny positively that they were ever criminally intimate. In this condition of the proofs, it is clear that no divorce should be granted, and that the petition of the wife must also be dismissed.

Domestic Telegraph Co. v. Metropolitan Telephone Co.

THE DOMESTIC TELEGRAPH AND TELEPHONE COMPANY, OF
NEWARK, NEW JERSEY

v.

THE METROPOLITAN TELEPHONE AND TELEGRAPH COM-
PANY, AND THE NEW YORK AND NEW JERSEY TELE-
PHONE COMPANY.

1. A court of equity may, in a proper case, decree the specific performance of a contract to renew a license.

2. Specific performance of a contract will not be decreed, unless the contract has actually been concluded; or, if any material part of it still rests in treaty, and remains to be settled by further negotiation, equity will not interfere.

3. No court has power to make a contract for persons *sui juris*, nor to compel them to agree with each other.

4. Where an injunction is sought in aid of action for specific performance, if the complainant's case is strong enough to render it at all probable that the complainant may, on final hearing, be able to convince the court that he is entitled to relief, the court will, as a general rule, award the writ, but will refuse it in cases where it appears that the contract sought to be enforced has not yet been made, or, if made, that it is so incomplete or uncertain as to be unenforceable.

On motion for an injunction heard on bill and affidavits and answer and affidavits, and order to show cause.

Mr. Henry Young and *Mr. Thomas N. McCarter*, for complainant.

Mr. Joseph D. Bedle, for defendants.

VAN FLEET, V. C.

The main object of the bill in this case is to procure a decree directing the specific performance of a contract. The complainant asks for an injunction, pending the suit, as auxiliary to the principal relief sought; in other words, to preserve to it the possession and use of certain property, which it is now unquestionably entitled to hold and use, if it shall be made to appear on

Domestic Telegraph Co. v. Metropolitan Telephone Co.

final hearing that the complainant is entitled to the relief it seeks. The question now before the court is, whether an injunction shall be granted or not.

The contract on which the complainant rests its right to relief was made by the complainant with the Bell Telephone Company, of New York, and bears date August 6th, 1879. Prior to the date last named, the Bell Telephone Company, of New York, had, by force of a license granted to it by the Bell Telephone Company, of Boston, acquired an exclusive right to use, and of licensing others to use, the patented instrument, known as the Bell telephone, in all the territory lying within a radius of thirty-three miles from the New York city hall in all directions, and also in all the territory of Long Island, in the state of New York, and of Monmouth county, in the state of New Jersey, but excluding any part of the state of Connecticut lying within such boundaries. The contract is lengthy, and contains a great many provisions having no connection with the complainant's present claim. Reference will only be made to such parts of it as are necessary to show its general character, and to the particular provision on which the complainant's action is founded.

It provides, in the first place, that the Bell Telephone Company, of New York, shall furnish to the complainant, in such quantities as may be required, Bell telephones to be used by the complainant in establishing a system of telephonic inter-communications within the city of Newark, in the county of Essex, and the townships of Harrison and Kearney, in the county of Hudson, but not elsewhere. The complainant binds itself to pay an annual royalty on each telephone delivered to it; to prosecute the business of introducing telephones diligently, not to use any other telephones than those furnished by the Bell Telephone Company, of New York, and not to permit any connection to be made between its lines and any other lines, except such as may be owned or controlled by the Bell Telephone Company, of New York. The Bell Telephone Company, of New York, reserves to itself the exclusive right of establishing telephonic communication between the complainant's district and other districts, and to regulate the charges on messages passing from one district into

Domestic Telegraph Co. v. Metropolitan Telephone Co.

another. It also agrees that, so long as the complainant keeps its contract, it will not authorize the use of the Bell telephone, or any other telephone, by any other person within the complainant's district, so as to interfere in any manner with the complainant's business. The contract also provides that a failure by the complainant to prosecute the business of introducing telephones diligently, or a violation by the complainant of its covenant not to permit a connection to be made between its lines and any other lines, except such as may be owned or controlled by the Bell Telephone Company, shall, at the option of the Bell Telephone Company, of New York, operate to end the contract, and confer upon the Bell Telephone Company, of New York, a right to take possession of the complainant's district, and carry on business therein as though no contract had been made. By the ninth paragraph, it is agreed that the contract shall remain in force for the period of five years, commencing on the 1st day of September, A. D. 1879, and terminating on the last day of August, A. D. 1884, at which latter date the complainant promises that it will deliver, or cause to be delivered, to the Bell Telephone Company, of New York, or to its agents, all telephones theretofore delivered to it and not previously returned. The eleventh paragraph is the one on which the complainant grounds its right of action. It is as follows:

"If, at the expiration of the above period of five years, the party of the first part shall not desire to conduct the business of telephonic district exchange directly within said district of the party of the second part, or of merging said district into some other district, but shall, on the contrary, desire to have such business conducted for it, then, and in such case, the party of the second part shall have the first right of acquiring the license or agency to conduct such business at such rate or rental, and upon such terms as may then be fixed and determined by the party of the first part."

On the 1st day of July, 1880, the Bell Telephone Company, of New York, sold, and formally assigned, its telephone lines and business, and also all its rights under the contract with the complainant, to the Metropolitan Telephone and Telegraph Company, one of the defendants to this suit. The complainant assented to this transfer, and has since then fully recognized the

Domestic Telegraph Co. v. Metropolitan Telephone Co.

Metropolitan Telephone and Telegraph Company as the successor of the Bell Telephone Company, of New York, and as standing in the place of the latter corporation under the contract of August 6th, 1879, both in respect to the rights and obligations created by that contract. By several subsequent transfers the defendant, the New York and New Jersey Telephone Company, has become invested with whatever rights, in the complainant's district, it was within the power of the Metropolitan Telephone and Telegraph Company to pass, or transfer, as against the complainant. The New York and New Jersey Telephone Company, as well as its predecessors in right, all took with full notice of the complainant's rights. In the license granted by the Metropolitan Telephone and Telegraph Company to the New Jersey Telephone Company, now merged in and constituting part of the New York and New Jersey Telephone Company, it is expressly stated that the privilege thereby given shall not embrace the complainant's territory, unless the complainant shall not be able to compel an extension or renewal of its license. The grant, it thus appears, is merely provisional or conditional. It is to have effect, as against the complainant, in case the complainant cannot compel a renewal, but not if it can. The defendants now before the court, as well as the corporations in whose rights they stand, all acquired whatever rights they have with full notice, not only of the complainant's contract, but of the claim made by the complainant for a renewal of its license. The case stands, therefore, in all substantial respects, and for all purposes of justice, just exactly as it would have stood if the original contracting parties were now, instead of the present parties, the litigants before the court. If the complainant, on the facts now before the court, would be entitled to relief against the Bell Telephone Company, of New York, were it the only party defendant here, I take it to be entirely clear that it is entitled to the same measure of relief against the defendants now here.

In April, 1884, the complainant applied to the Metropolitan Telephone and Telegraph Company for a renewal of its license, or a new license. Its application was refused. Subsequently, the bill in this case was filed to compel the Metropolitan Tele-

Domestic Telegraph Co. v. Metropolitan Telephone Co.

phone and Telegraph Company to specifically perform the contract of August 6th, 1879, by granting to the complainant a new license, "*upon such terms as may be determined by the court.*" As ancillary to such relief, the complainant asks that, pending the litigation, an injunction shall issue, restraining the defendants from removing the telephones now in its possession; also from interrupting communication between the complainant's district and other districts, and also from interfering with complainant's business in its district.

The power of the court to give the complainant the relief it asks is unquestionable. Though courts of equity do not, as a general rule, exercise as liberal jurisdiction over contracts of the kind which the complainant seeks to have enforced, as they do over contracts relating to land, yet their power to decree the specific performance of such contracts in a proper case, as, for example, where the complainant has not a clear, complete and adequate remedy at law, or where some other ingredient of equity is mixed with the transaction, is now firmly established. *Cutting v. Dana*, 10 C. E. Gr. 265.

The complainant's whole equity rests in the allegation that it is entitled, by the terms of the contract, to a renewal of its license. But upon what terms? The complainant says: "*Upon such terms as may be determined by the court.*" Courts of equity may compel the specific performance of a contract which the parties have agreed upon, and which is sufficiently certain and definite in its terms to enable the court to see what they meant, but it is entirely beyond the power of any judicial tribunal to make a contract for litigants, or compel them to make a contract with each other. The principle which must govern the decision of this case is free from all doubt. No court has power to make a contract for persons *sui juris*. No specific performance of a contract can be decreed in equity, unless the contract be actually concluded, and be certain in all its parts. If the matter still rests in treaty, or if the agreement, in any material particular, be uncertain or undefined, equity will not interfere. *McKibbin v. Brown*, 1 McCart. 1; *S. C., on Appeal*, 2 McCart. 498; *Potts v. Whitehead*, 5 C. E. Gr. 55; 8 C. E.

Domestic Telegraph Co. v. Metropolitan Telephone Co.

Gr. 512; Whitlock v. Duffield, 1 Hoff. Ch. 110; S. C., on Appeal, 26 Wend. 55; Waterman on Spec. Perf. §§ 141, 152. Specific performance will not be decreed unless it is shown that a contract has been concluded. The bargain must have been completely determined between the parties, and its terms definitely ascertained. So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed. *Brown v. Brown, 6 Stew. Eq. 650.*

The contract, it will be observed, does not contain an unconditional covenant of renewal, or, indeed, a covenant to renew at all, but it merely provides that, on the expiration of the term of the first license, and in a certain contingency, the complainant shall have the first right of acquiring a license. The covenant is not that the licensor shall renew the complainant's license, nor that the complainant shall, if it desires, have a new license, but merely that it shall have a first or preferential right to acquire a license. This, it is plain, is not equivalent to a covenant to renew. Under a covenant to renew, the rights of the licensee are fixed and certain; they are superior to those of any other person, and determinate; no other applicant can compete with him, nor can the terms offered by any other applicant be contrasted with those offered by him. The licensor must renew if the licensee so elects, whether he is willing to or not. But under the language of this covenant the thing promised to the covenantee is not a renewal of its license, but merely the first right or chance to make a bargain for a license. Before any right can arise under such a stipulation, it is clear that it must be shown that a bargain has been made. Construed for the complainant as favorably as its language will warrant, it is manifest that all that the covenant gives the complainant is the first right to make a bargain for a new license. Such a covenant cannot be enforced in equity. But let us suppose that the contract gave the complainant an absolute right of renewal without specifying terms, then the question would arise, For what period and on what terms should the renewal be granted? These matters, by the plain

Domestic Telegraph Co. v. Metropolitan Telephone Co.

letter of the contract, are left entirely and absolutely to the will of the licensor, the language of the contract being that "the complainant shall have the first right of acquiring the license or agency to conduct such business at such rate or rental, and upon such terms, as may then be fixed and determined by the party of the first part." It would be difficult, I think, to find language expressing with more perspicuity than this does, an intention on the part of the licensor to reserve to itself an absolute and unqualified right to dictate the terms of the contract. There is not only an entire absence of a specification of the terms on which the new license shall be granted, but an express stipulation that the licensor shall have a right to exercise an uncontrolled will in fixing the terms. Under such a stipulation the licensor is left as free in every respect as it would be if no previous contract relations had existed between the parties, and the complainant now, for the first time, applied for a license. This court cannot compel a person to make a contract, the terms of which have not been agreed upon, though he may have covenanted to do so. If the licensor in this case had made an unconditional promise to renew for a definite period, but upon terms to be afterwards agreed upon or fixed by the licensor, the contract would be so incomplete and defective that it would be incapable of enforcement. *Duffield v. Whitlock*, 26 Wend. 55.

Nor is the complainant's case at all strengthened by the fact that since its contract was made, the corporation now having the right to grant a license for the complainant's territory, has agreed with the corporation owning the Bell telephone patents that it will not charge its licensees, as royalty or rental for telephones, in excess of a specified sum. The complainant is not a party to that contract, and consequently acquired no rights under it and did not become bound by its terms. If it is broken, the complainant will sustain no injury—at least none that the law can redress. The other contracting party is the only person who can suffer a legal injury by its breach, or ask legal or equitable redress for its violation. But in addition it is not pretended that that contract fixes or defines the period for which licenses shall be granted. The corporation to which the complainant must go

Domestic Telegraph Co. v. Metropolitan Telephone Co.

for a renewal of its license is absolutely unbound, either to the complainant or to any other person, as to the period the new license shall run, and is at liberty to fix a day or a week, just as it may will. The fatal infirmity of the complainant's case is not that its contract is uncertain or incomplete, but that it has no contract. Its licensor has never agreed that it would renew its license, and until such an agreement is made it is impossible for this court, or any other, to decree specific performance. There can be no doubt that in a certain class of cases, courts of equity will decree the specific performance of contracts which are incomplete or uncertain in a material particular, but such jurisdiction is never exercised, except in cases where the contract itself provides a method or standard by which it may be completed, or its uncertainty rendered certain. To illustrate: A contract for the sale of land, at a price to be agreed upon by the parties, will never be enforced in equity for the reason that a further bargain must be made by the parties before the court can decree what the vendor shall receive for his land. But where the parties have agreed that the land shall be conveyed, not at a price to be agreed upon by themselves, but at a fair price or at a fair valuation, there, the parties having fixed a standard or measure of value, without having designated any particular method for ascertaining the price, the court may, without making a contract, ascertain the price according to the standard fixed by the contract, and enforce the contract. *Van Doren v. Robinson*, 1 C. E. Gr. 256; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Wilks v. Davis*, 3 Mer. 507. But this is the extreme limit to which any court has ever gone.

The complainant contends that its case falls directly within the principle established by these cases. Its contention is this: That the contract on which its action is founded provides a method for settling the terms on which its license shall be renewed, and inasmuch as that is the fact an injunction should issue to preserve to it its business and the telephones now in its possession until the method provided by the contract for settling the terms shall have been tried and proved ineffectual. The sixteenth paragraph of the contract declares that in the event of

Domestic Telegraph Co. v. Metropolitan Telephone Co.

disagreement between the parties, arising out of the contract, or any clause thereof, such matter of disagreement, unless it can be satisfactorily adjusted, shall be determined by arbitration. By this clause it is insisted that the parties have agreed that in case they cannot agree upon the terms of the new license, they shall be settled by arbitration. It is impossible for me to read the contract so as to give this clause any such effect. The clause under consideration simply provides for the reconciliation of differences or disagreements arising out of matters upon which the parties have already agreed, or for the settlement of matters upon which each party has a right to form a judgment or to exercise a will or choice. There can be no disagreement between the parties about the terms on which the new license shall be granted. They are to be such as shall be fixed and determined by the licensor. They are not the subject of agreement but of dictation. They need not be fair or reasonable or just—they may even be such as the licensor knows the licensee cannot accept. In making terms, the licensor has reserved to itself, in clear terms, absolute freedom, and in that respect it stands as completely unshackled as though no previous contract relations had existed between the parties. It is manifest, I think, that neither of the parties ever supposed that the terms on which the new license should be granted were, in any event or under any circumstances, to be settled by arbitration.

This is not a case, in my judgment, in which an injunction should be granted. It is true that in cases of this kind, where an injunction is sought in aid of an action for specific performance, that the court will, as a general rule, if the complainant's case is strong enough to render it at all probable that he may, on final hearing, be able to convince the court that he is entitled to relief, award an injunction; but in cases where there is no doubt—where it is clear that the contract sought to be enforced has not yet been made, or if it has been made, that it is so incomplete or uncertain that it cannot be enforced—an injunction must be denied, for the very obvious reason that the complainant has no equity which entitles him to the writ.

The order to show cause must be discharged, with costs.

Bracken v. Smith.

THOMAS W. BRACKEN

v.

SAMUEL SMITH.

Where there are two statutes on the same subject, passed at different dates, and it is plain from the frame-work and substance of the last that it was intended to cover the whole subject, and to be a complete and perfect system in itself, the last act must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed.

On motion to dissolve an injunction.

Mr. Charles J. Roe, for motion.

Mr. Franklin M. Olds, contra.

VAN FLEET, V. C.

The motion in this case raises a single question. It is this: Is an affidavit such as the act of 1878 (*P. L. p. 139*) required, necessary, since the act of 1881 (*P. L. p. 226*), to give validity to a chattel mortgage as against the creditors of the mortgagor?

It is admitted that the consideration of the mortgage on which the bill in this case is founded was not verified as required by the act of 1878, but the mortgage was simply acknowledged and recorded in conformity to the requirements of the act of 1881. The mortgage was executed since the act of 1881 took effect; the mortgagor retained the possession of the things mortgaged; the defendant is a judgment creditor of the mortgagor, who has procured the things mortgaged to be seized under an execution issued on his judgment; so that it will be perceived that if the law in force at the time the complainant's mortgage was executed, required its consideration to be verified by an oath, his mortgage is absolutely void against the defendant.

In order to understand the full scope and purpose of the act of 1881, it is necessary to look at the prior legislation. It should

Bracken v. Smith.

be said, at the outset, that one of the principal purposes of all legislation on this subject has been to prevent secret pledges of chattels being made as security for debt. Hence almost every statute which was intended to be complete in itself, has plainly declared that if the mortgagor retained possession of the things mortgaged, the mortgage should be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless it was made a matter of public record. By the statute as revised in 1875, the mortgagee was required, in order to give validity to his mortgage against others than the mortgagor, to file it in the proper office. *Rev. p. 709 §§ 39, 40.* But he need do nothing more. Neither his oath to the consideration, nor that the mortgage was founded on an actual debt, nor an acknowledgment by the mortgagor, was required. The thirty-ninth section of this statute was amended by a supplement passed in 1878 (*P. L. p. 139*), and, as amended, it enacted that unless the mortgage, or a true copy thereof, having annexed thereto an affidavit of the holder, or his agent, stating the consideration of the mortgage, and as near as possible the amount due and to grow due thereon, was filed as directed by the statute, the mortgage should be absolutely void against the creditors of the mortgagor. An affidavit such as the act required was made absolutely indispensable to the validity of the mortgage. *Ehler v. Turner, 8 Stew. Eq. 68.* By another supplement, passed in 1880 (*P. L. p. 266*), the clerks and registers of the several counties of this state were authorized to record in suitable books to be provided for that purpose, chattel mortgages, which should thereafter be filed pursuant to the law then in force, provided they were first acknowledged or proved as deeds of lands were then required to be acknowledged or proved. This act did not repeal the act of 1878, nor dispense with the affidavit required by the act. The mortgagee was still required to swear to the consideration of the mortgage, and to file it, or a copy of it. The change made by the last supplement was this: As the law stood prior to its enactment, a mortgagee, in order to preserve the lien of his mortgage for a longer time than one year from the date when it was first made a matter of public record,

Bracken v. Smith.

was required to refile a copy of his mortgage, with a statement, under oath, showing the amount still remaining due to him. Under the provisions of the act of 1880 he could relieve himself from the necessity of refiling his mortgage, provided in addition to swearing to its consideration and filing a copy of it, he procured his mortgage to be acknowledged and recorded. Recording it had the effect, under the provisions of this supplement, of preserving its lien without any further act on the part of the mortgagee until it was paid. This is the construction which has been given to this supplement. *Stevenson v. Vosseller*, 14 Vr. 553; *Field v. Silo*, 15 Vr. 355.

This brings us to the act of 1881, and the question to be decided under it is, whether it was intended as a substitute for all previous statutes, and for that reason nullifying them, not because of any irreconcilable repugnancy existing between them and it, but because it was intended to be a complete and perfect system in itself, and to take the place of all earlier statutes on the subject, or whether it was intended simply as an addition to the previous statutes, leaving them to stand in full force except so far as they were altered by it. It is clear, I think, that it cannot be said that a repeal of the former statutes was effected by mere repugnancy. There is no irreconcilable repugnancy between a statute which declares that a contract shall not be valid unless its consideration is vouched for by the oath of one of the parties to it, and a subsequent statute which declares that such contract shall not be valid unless its execution is authenticated by the certificate of a particular officer, and the contract itself recorded. But a careful comparison of the act of 1881 with the previous legislation, will, I think, leave no doubt whatever that it was the intention of the legislature, by the latter act, to make a complete revision of all the law on the subject, and to substitute that act for all previous statutes. The act of 1881 covers the whole subject and forms a complete legislative scheme. Its first three sections are literal transcripts of the corresponding sections of the statute as revised in 1875. Its fourth section is identical in language with what would have been the fourth section of the revised act, if that part of the act concerning mortgages which

Bracken v. Smith.

relates to chattel mortgages, had been revised as a separate statute, except that instead of requiring that the mortgage, or a copy of it, shall be filed, it requires that the mortgage shall be recorded. The next section enacts that no instrument intended to operate as a mortgage of chattels shall be recorded until its execution shall have been acknowledged or proved in the manner prescribed by the act respecting conveyances. The next two sections define the duty of clerks and registers in recording such instruments, fix their fees and provide that a certified copy of the record of such instruments shall be received in evidence. The ninth section declares :

“That every chattel mortgage hereafter recorded pursuant to the provisions of this act, shall be valid against the creditors of the mortgagor, and against subsequent purchasers and mortgagees, from the time of the recording thereof until the same be canceled of record in the manner now provided by law for canceling mortgages of real estate.”

Provision is also made for recording such chattel mortgages as had theretofore been filed under previous acts, and were still subsisting securities.

This summary of the prior legislation, and a comparison of it with the act of 1881, leave no doubt on my mind as to the effect which must be ascribed to the act of 1881. By the passage of that act, the legislature intended, as I think, to gather up and incorporate in a single act all the prior legislation that they thought worth preserving, and to sweep the rest away. The legal rule which must control the decision of the case is perfectly well settled. Where there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *United States v. Tynen*, 11 Wall. 88. Mr. Justice Van Syckel, in *Roche v. Jersey City*, 11 Vr. 257, 259, said : “This rule does not rest strictly upon the ground of repeal

Una v. Dodd.

by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions mentioned in the later act as the only ones on that subject which shall be obligatory." A further reference to authority is deemed unnecessary. The two citations made will give a reference to most of the pertinent adjudications.

My conclusion is that the complainant's mortgage is not void for the want of an affidavit, and that the motion of the defendant must be denied, with costs.

WILLIAM UNA et al., petitioners,

v.

DANIEL DODD et al., respondents.

The officers and managers of a savings bank petitioned the chancellor for an order directing them, among other things, to invest all moneys deposited in the bank, after a designated date, in certain specified securities. Loans of part of these deposits were afterwards made by the president, without the knowledge or subsequent approval of the other managers or finance committee, on the promissory note of the borrowers, secured by collaterals other than those specified in the order. Other loans of part of these deposits were similarly made by the president, under an agreement with the borrowers, that the latter should retain a sufficient amount of "good securities" to cover these loans. The "good securities" never were, in fact, those stated in the order, and the borrowers for several years, and as long as the loan continued, had the custody of the box containing the "good securities" in their own vault, and the exclusive access thereto, and removed and changed the securities at pleasure.—*Held*, that this court had jurisdiction over the managers, and power to make the order; that the loans by the president were "investments," and a violation of the order, rendering him punishable for a contempt, even if the bank sustained no pecuniary loss therefrom; that the conduct of the other managers was not a contempt, although some of them knew, after the loans had been

Una v. Dodd.

made, of the kind of securities taken by the president, and had thus been negligent in the discharge of their duties.

On petition and answers and proofs taken in open court.

Mr. Frederick W. Stevens and *Mr. Samuel Kalisch*, for petitioners.

Mr. E. S. Black, for German depositors.

Mr. John R. Emery, *Mr. Thomas N. McCarter* and *Mr. Benjamin Williamson*, for Daniel Dodd.

Mr. George W. Hubbell, for A. Bishop Baldwin, Algernon S. Hubbell, Francis Mackin, Henry H. Miller and George W. Watson.

Mr. E. M. Colie, for James G. Barnet and Matthias M. Dodd.

Mr. Carl Lentz, for Hugo Fraentzel.

Mr. Frederick Frelinghuysen, for William T. Mercer.

Mr. John W. Taylor and *Mr. Albert P. Condit*, for William Rankin, Daniel Price and Charles S. Haines.

Mr. Henry Young, for Bernard Stanley.

Mr. Frederick H. Teese, for Henry G. Darcy.

VAN FLEET, V. C.

The question to be decided in this case is whether certain persons now before the court on a charge of contempt, should be adjudged guilty or not. They are charged with having contumaciously violated an order of this court. It is important that the circumstances under which this order was made should be stated.

The managers of the Newark Savings Institution, on the 12th of December, 1877, represented to the chancellor, by petition,

Una v. Dodd.

that while the corporation under their charge was the owner of sufficient assets estimated at their face value to pay all of its depositors in full, yet that a part of its assets were so greatly depreciated in consequence of the depression of the times, as not to be immediately available, except at great loss; they further represented that a very large amount of deposits had been withdrawn during the previous year, and that they believed a much larger amount would be withdrawn during the next year; that they would be able, for a long time to come, to continue to pay depositors on demand, but that that course would make it necessary for them to convert their most valuable assets into cash, leaving those that were depreciated and unavailable, except at a great loss, for the less vigilant depositors; and that they believed that they could not pursue that course without violating their duty as trustees, as it would necessarily result in inequality in the distribution of the assets of the corporation, and those of the depositors would suffer most who were least able to bear loss, and least able to take care of themselves. They further stated that they regarded the institution as an incorporated agency, without capital, and without stock, and that its managers were the trustees of the depositors, to invest the money they deposited with the institution; that the assets of the institution were the property of the depositors, in proportion to their several deposits; that if losses were sustained, the depositors were bound to bear them ratably, and if gains were made, they were entitled to share them *pro rata*. They also stated that they were assured that, by careful management of their trust, under the direction of this court, the existence and usefulness of the institution could be maintained, and its depositors secured against loss, notwithstanding the extraordinary circumstances of disaster in which it had become involved. And they then said that with these views of their duties as trustees, and the rights of their beneficiaries, and in consideration of the magnitude of the interests involved, they were unwilling to proceed further in the execution of their trust, without the direction of this court, which, as they were advised, it was the duty of this court to give in the exercise of its jurisdiction over the administration of trusts.

Una v. Dodd.

They further said that without such direction they were satisfied that they could not maintain the institution in public confidence, nor secure equality in the distribution of its assets among the depositors, which latter, as they declared, was the fundamental principle of the institution. The petition also stated that the managers, before making their application, had sought the best advice as to the nature of their duties, and the extent of their powers that they could obtain, and had, themselves, carefully considered the course best adapted to promote the purposes of their trust, and that their application was the joint result of the advice they had received, and of their own consideration.

On the facts and legal propositions thus stated, the managers asked that such direction be given as would secure a just and equal distribution of the assets of the institution among the depositors; that the court assume control of the future administration of the trust so long as it should be deemed necessary to promote the interests of the institution, and insure its permanency and prosperity, and that an order be made permitting the institution to receive deposits in the future, but providing that such deposits should be treated as special deposits, and be invested only in the bonds of this state, or of the city of Newark, or of the United States, and directing, also, that separate accounts should be kept of such deposits. The intervention of the court was asked to secure two objects: First, a just distribution of the assets of the institution, and second, the preservation of the institution. The managers were represented before the court by counsel of great ability and high distinction, and the court after hearing counsel, and after thorough examination, and full, careful and deliberate consideration, concluded that the managers were entitled to the aid they sought, and an order was accordingly made. *Matter of the Newark Savings Institution*, 1 Stew. Eq. 552. The full text of that part of the order which is material to the present inquiry reads as follows:

"It is ordered by the chancellor that all deposits in said institution made on and after the twelfth day of December, eighteen hundred and seventy-seven, and until the further order of this court, shall be treated as special deposits, and invested only in the bonds of this state, of the city of Newark, or

Una v. Dodd.

the United States, and that separate accounts thereof shall be kept, and the actual interest received thereon, deducting necessary expenses and taxes, be paid as dividends upon such special deposits."

This order was so far changed, on the 2d of June, 1880, as to permit fifty per cent. of the special deposits to be invested in mortgages on real estate, but it also declared that the remaining fifty per cent. should continue to be subject to the regulations theretofore made, and be invested only in United States, New Jersey and Newark city bonds. A very large amount of money was deposited in the institution after the 12th of December, 1877. On the 16th day of May, 1884, when a receiver was appointed to wind up the institution as an insolvent savings bank, there was due to depositors on the new or special deposit account over \$6,150,000. The institution was carried down by the failure of Fisk & Hatch, a firm of bankers doing business in the city of New York. When Fisk & Hatch failed, on the 15th of May, 1884, they held, or should have held, United States bonds, belonging to the institution, worth at par \$2,036,000, and they owed the institution, in addition, for borrowed money, and for which the institution held no security whatever, \$845,000, making a total of \$2,881,000, nearly one-half of the whole assets of the new account at the time of the failure of the institution. Another loan, made by the managers to E. H. Harriman & Co., also bankers doing business in the city of New York, of \$800,000, was outstanding. This last loan was secured by collaterals, but the collaterals consisted of other securities than those required by the order.

The contumacious acts charged against the managers consist in making investments contrary to the direction of the order of December 12th, 1877, and in violation of both its letter and spirit. Many acts are charged; four are all, however, that need be specified now.

It is charged that the managers made a loan of \$800,000, in April, 1883, to E. H. Harriman & Co., and another to the same borrowers, of the same amount, in April, 1884. Both these loans were secured by collaterals, but the collaterals were not such as were required by the order. In both cases the collaterals

Una v. Dodd.

consisted mainly of bonds issued by the Illinois Central Railroad Company. It is also charged that the managers, in December, 1882, loaned to Fisk & Hatch, United States four per cent. registered bonds, of the par value of \$580,000, without any security whatever; and that in January, 1883, they made a loan of \$1,700,000 to the same borrowers, without security.

The managers meet these charges by a denial, first, of the power of the court to make the order alleged to have been contemned; and second, of the fact of contempt. They take the broad ground under their first denial, that the court had no power to make the order, and consequently that they were not bound to obey it, and committed no contempt in violating it.

If it were possible for a party to commit a contempt of court, by the inherent insolence of his defence, it would seem to be quite plain, when the circumstances under which the order alleged to have been violated was made are considered, that some of the persons now before the court on a charge of contempt, must be adjudged guilty, whether their conduct prior to their appearance in court, on the present charge, justified their conviction or not. With my views of what constitutes propriety, decency and manliness, it is scarcely possible for me to imagine a course of conduct more disrespectful and insulting than for a suitor to ask a judicial tribunal to give him, by the rightful exercise of its undoubted jurisdiction, aid and protection, convince the court that he is entitled, by the law of the land, to what he asks, cause the judgment of the court to be entered on its records and take to himself all the benefit and advantage that can accrue from the judgment, and then, after he has got all he can get, and when his interests, or his caprice, or his conceits make it desirable for him to do so, to insult the court by trampling upon its judgment and defying its authority, and when he is called upon to answer for his misconduct, to tell the court that it is without power to punish him, for it had no authority to pronounce the judgment which he convinced it that it had authority to pronounce, and which he has since contemned. This is not, however, the attitude in which that manager, in whose behalf this defence has been most strenuously urged, stands be-

Una v. Dodd.

fore the court. He was unwilling that this defence should be made ; it was made, as his counsel state, against his protest. I am satisfied that if his position before the court is that of a mocker, he has not assumed it voluntarily. His counsel have, nevertheless, interposed this defence for him, and have therefore imposed upon the court the duty of deciding whether it is entitled to prevail or not.

Jurisdiction is power, and when applied to a judicial tribunal means authority to hear and decide judicially. The test in every case of controverted jurisdiction is, Had the court authority to pronounce judgment on the question presented for decision? If it had, its jurisdiction is complete and indisputable, and its judgment, whether correct or erroneous in point of law, is unimpeachable and irreversible, except by direct appellate proceedings. If it had not, its judgment is a nullity, not merely voidable but void. The question in all such cases is not has the court erroneously exercised a power rightfully belonging to it, but has it usurped power and attempted to exercise authority never granted to it.

If the court has jurisdiction over the subject-matter and over the persons to be affected by the judgment, and pronounces a judgment on the question presented for decision by the pleadings, its judgment, whether right or wrong, is, in its very nature and essence, final and conclusive so long as it stands, not only on the parties, but on all the world. A void judgment, however, one which is pronounced without authority of law, and is a simple act of usurpation, is no judgment at all, and concludes nothing and binds nobody.

The defence, then, under this head, to be effectual, must go to the extent of demonstrating that the order alleged to have been contemned was an act of usurpation. If it falls short of that it constitutes no defence. For if the court had jurisdiction, but misconceived or misunderstood the law, or applied it erroneously, and in consequence pronounced a judgment wrong in point of law, its judgment, nevertheless, until reversed, possesses full force, and is just as binding and conclusive as it would be if it were right in point of law. It is not true that disobedience of an order is only a contempt of court when the order violated is free

Una v. Dodd.

from legal error, and is in that sense a lawful order. The established doctrine on this subject is this: A judgment or an order made by a court having jurisdiction must be obeyed, even if error is manifest on its face. Error in such case can only be corrected by appropriate legal proceedings and not by disobedience. A party accused of contempt cannot excuse or exculpate himself by alleging, or even showing, that the judgment or order which he has violated is erroneous in point of law. He must go further and show that the judgment or order is void. If the court had power to pronounce the judgment, or to make the order, then, whether correct or erroneous, it is the established law of the case until reversed, and on proceedings for contempt its validity in point of law can neither be examined nor disputed. *Richards v. West*, 2 Gr. Ch. 456; *Cape May and Schellengers' Landing R. R. Co. v. Johnson*, 8 Stew. Eq. 422; *Woodward v. Earl Lincoln*, 3 Swanst. 626; *Sullivan v. Judah*, 4 Paige 444; *Day v. Bergen*, 53 N. Y. 404; *People v. Sturtevant*, 9 N. Y. 263; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Reed*, 100 U. S. 13; *Williamson's Case*, 26 Pa. St. 9. Lord Truro's statement of this doctrine, in *Russell v. East Anglian Railway Co.*, 3 Macn. & G. 104, 117, is so apposite and forcible that I cannot refrain from quoting it. He said: "It is an established rule of this court that it is not open to any party to question the orders of this court by disobedience. I know of no act which this court may do which may not be questioned in a proper form and on a proper application; but I am of opinion that it is not competent for any one * * * to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained." The question then is, Is the order alleged to have been violated void or not? Its nullity is put mainly on the ground that this court, in the exercise of its original or general jurisdiction, and in the absence of statutory authority, has no authority to interfere in,

or to assume control over, the internal affairs of a corporation. Stated in its most general and comprehensive form, the legal principle above enumerated is undoubtedly correct. Mr. Spence, in his treatise on Equitable Jurisdiction, says: "The court of chancery, before the passage of the municipal corporation act, did not entertain jurisdiction to compel the application of property belonging to a corporation, to corporate purposes, from the difficulty, as it would seem, which would have attended the attempt to carry out such a jurisdiction. But," he adds, "where there is any fund created for the purpose of being applied to some public purpose, which fund is vested in a corporation, the court of chancery has, by its original inherent jurisdiction, a right to see to the due application of the fund. The court of chancery would always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity; and a corporation being a trustee is, in this court, the same as an individual." 2 *Spence's Eq. Jur.* 34. The jurisdiction of this court to declare whether trusts exist or not, to define and construe their terms, and to control and direct their administration and execution, stands among its most ancient and incontestable powers. The order in question was made in the exercise of this jurisdiction, and was one that the court was not only undeniably competent to make, but, if the facts which were presented to induce it to act were true, it was one that it was required to make to prevent wrong to the poor and insure justice to the helpless.

Nothing is better settled, nor more familiar as a principle of equity jurisprudence, than that trustees are entitled, in a proper case, to the direction and protection of a court of equity in the discharge of their duties. Whenever the duty of a trustee is involved in doubt, or the terms of the trust will justify the *cestuis que trust* in settling up conflicting claims to the trust property, there can be no doubt that it is the right of the trustee to do nothing until he receives judicial instruction as to his duty; and in a case where all the *cestuis que trust* stand on the same foundation, and are all entitled to the same benefit from the trust, and it is possible for a part of them, in consequence of their greater

Una v. Dodd.

knowledge or superior diligence to compel the trustee, in the absence of judicial action, to give them an unfair advantage over the others, there can be no doubt that it is the duty of the trustee to take such action as may be necessary to prevent the wrong. If, with full knowledge that wrong was being committed, he failed or refused to act, he would not only be faithless to his duty, but an abettor of the wrong.

The precise nature or character of this trust, whether, according to settled definitions, it should be called a public trust, or a *quasi* charitable use, or a private trust, is, in my view, a matter of no importance whatever to this inquiry. The power of this court to take cognizance of all trusts when judicial action is required, is beyond dispute. It has original and exclusive jurisdiction of all public trusts. Its judgment that a certain trust is a good charitable use, whether correct or erroneous in point of law, must stand as final and conclusive, and as declaring the law authoritatively for that particular case until reversed. That the assets of a savings bank in the condition that this institution was represented to be in when the managers sought the protection and direction of this court, are held in trust for all the depositors, is a proposition so incontestably sound in its law as to stand, in my judgment, entirely outside of the domain of debatable questions.

Such a corporation as this differs in all its essential features from an ordinary joint stock corporation. It has no capital or stock; it is not created for the benefit of its incorporators; its managers, as managers, have no property in its funds, but it is created solely for the benefit of such persons as shall become depositors in it. Its fundamental object is to ameliorate the condition of those who are compelled to depend upon their labor for sustenance and the accumulation of property, by inciting them to the practice of habits of industry and frugality. This is accomplished by affording them an incorporated agency or trustee, for the safe keeping and provident investment of their surplus earnings. The depositors, who alone are beneficially interested in the prosperity of the corporation, have no voice in its management, nor in the selection of the persons to whom its

Una v. Dodd.

management is entrusted. The only assets of such a corporation are its investments, representing the common contributions of all its depositors, in which all have a common interest. All the profits the corporation makes must be divided among all its depositors, or accumulated in a surplus for their joint benefit or greater security. As each depositor is entitled to his proportionate share of the profits, so, in equity, each must bear his proportionate share of the losses. *Hannon v. Williams*, 7 Stew. Eq. 255; *Matter of the Newark Savings Institution*, 1 Stew. Eq. 552; *Stockton v. Mechanics and Laborers Savings Bank*, 5 Stew. Eq. 163; *Coite v. Society for Savings*, 32 Conn. 173; *Bunnell v. Collinsville Savings Society*, 38 Conn. 203. Mr. Justice Strong, of the supreme court of the United States, in *Huntington v. Savings Bank*, 96 U. S. 388, said that the primary idea of a savings bank is, that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends, or in a reserved surplus for their greater security. He also likened such a corporation to that of church wardens, for the conservation of the goods of a parish, to a college of surgeons for the promotion of medical science, and to a society of antiquaries for the advancement of the study of antiquities.

If the foregoing summary states, with anything like substantial accuracy, the nature and objects of a savings bank, it seems to me that there is no ground whatever for doubt that if the condition of the Newark Savings Institution was what the petition of the managers represented it to be at the time the order in question was made, it was not only competent for this court to make the order, but it was its imperative duty to do so.

But it is also insisted that the order alleged to have been contemned is void, because the court did not have jurisdiction of the parties necessary to enable it to make a valid order. The court unquestionably had jurisdiction of the managers. Service of process on a suitor who comes asking the protection and direction of a court, is not necessary to give the court jurisdiction over him. He submits himself to the jurisdiction of the

Una v. Dodd.

court, by invoking its judgment. None but persons having an interest in the subject-matter of a suit or proceeding, can be made parties to it. It was not possible in this branch of the proceeding, according to settled rules of procedure, to bring any other person or party before the court than those that were there. The managers asked that this corporation be preserved, and to that end that it be allowed to receive deposits in the future. They also asked that such deposits be kept separate from the other assets of the institution, and be invested only in such securities as were, according to general experience, safe and good, readily convertible at any time, and not liable to depreciation. They were the only persons who then had the slightest interest in the questions thus presented. The questions concerned their future conduct as trustees, with reference to money to be thereafter committed to their care, and they were, therefore, obviously the only persons whom the court could have before it. Besides, the order concerned them alone. They asked to be directed as to what they should do in the future, in the discharge of their duty as trustees. The court told them. They had a right to ask for direction, and it was the duty of the court to give it, and they, after receiving it, were bound not only to respect it, but to follow it implicitly.

The order under consideration was, in my judgment, not only a rightful exercise of lawful power, and not a usurpation, but was also correct in its law, and wise in its provisions and policy. Had it been obeyed, an old and valuable charitable institution would have been preserved to the public, public confidence would have been restored, and all danger of loss to the depositors averted.

This brings us to the question, Has the order been contumaciously violated? In a case of this kind, in order to justify a conviction, the proofs must show clearly and satisfactorily that the party accused has willfully disobeyed the order of the court. If his disobedience is the result of honest mistake, or if the order alleged to have been contemned is so uncertain and ambiguous in its terms as to fairly warrant two constructions, one of which will make his act or omission a contempt, and the

Una v. Dodd.

other, not, there being no contempt in fact, none should be adjudged in law. The order in this case is free from all uncertainty, and very clear, plain, direct and positive in its terms. The managers had asked the chancellor to assume control of the future administration of the trust, and to give such direction, and to prescribe such regulations for its future management as he should deem necessary to insure the permanency and prosperity of the institution. They wanted direction which should cover the whole field of their duty. They asked specially that he would permit the institution to receive deposits in the future, and by order direct that such deposits should be kept separate from the other assets of the institution, and be invested only in certain securities. Such an order was made, and the question now before the court is, Has it been willfully violated?

There is no dispute; indeed, the fact is confessed that a loan of \$800,000 was made to E. H. Harriman & Co., in April, 1883, on their note at eleven months, secured by other collaterals than those prescribed by the order; and that another loan of the same amount to the same borrowers was made on the same terms, and secured in the same way, in April, 1884. The first of these loans was paid before the second was made, and the last was paid to the receiver after the failure of the institution. These facts would seem to demonstrate beyond all controversy that the order had been willfully violated. But it is said that although a technical contempt may have been committed, yet nobody was harmed by it, no loss ensued, and where that is the fact, to punish the contemner for his contempt, is an act of vengeance. I do not understand that to be the law. The law does not indulge in revenge. When a court inflicts punishment on a contemner of its authority, it does not do so from any sense of personal wrong or insult, but to vindicate the power and majesty of the law, and to compel obedience to its mandates. It is the duty of every citizen to respect and obey the law. There can be no civil order, or safety of person, or security of property without obedience to law, and obedience to the constituted authorities will prevail just to the extent that it is certain that *punishment will follow disobedience*.

Una v. Dodd.

Besides, when a court makes an order, it is impossible for the court to follow the person to whom the order is issued, from day to day, to see that it is obeyed. It has a right to repose confidence in the loyalty of the citizen to the law, and to believe that he will obey its mandate. If its confidence is abused, it must punish the offender. That is the only means at its command to maintain its authority and deter disobedience.

But it is also contended that those transactions were temporary loans, and not investments, and were not, therefore, within the terms of the order, nor interdicted by it.

Both terms—"invest" and "temporary loans"—are used in the charter. By the seventh section of the charter (*P. L. of 1847 p. 108*), it is enacted that the corporation shall invest no money in any other than certain designated securities. By a supplement passed in 1859 (*P. L. p. 5*), the corporation is authorized to make temporary loans upon personal securities, with pledges of collateral securities at least equal to the amount loaned. So far as I am aware, there is no technical legal definition of the term "investment" as applied to money. In its most comprehensive sense, I think it is generally understood to signify the laying out of money in such manner that it may produce a revenue, whether the particular method be a loan or the purchase of stocks, securities or other property. In common parlance, it means putting out money on interest, either by way of loan or the purchase of income-producing property. The order under consideration was intended to prescribe, and does prescribe, in very plain terms, that the special deposits received under it should be used for investment in certain designated securities, and for no other purpose whatever. Its direction is, that the new deposits shall be treated as special deposits, and invested only in certain designated securities, that a separate account shall be kept of them, and the interest received on them distributed in dividends among the persons making such deposits. There are some things so plain that argument rather serves to obscure than to make more manifest. One of the objects of the managers in asking the court to assume control of the future administration of the trust was, to insure the permanency and future pros-

Una v. Dodd.

perity of the institution. That could not be attained, unless the most explicit and trustworthy assurances were given to the public that every dollar thereafter deposited would be safely kept, and so invested as to render a recurrence of the circumstances of disaster in which the institution was then involved, impossible. The managers understood that, and for that reason asked that the direction to be given respecting the manner in which the new deposits should be treated and employed, should be such as should exclude the least possible danger of loss, and assure the public that they would be invested in certain unquestionably safe securities and in no other way. Such direction was given. The managers were directed not to invest, that is, to place or put the new deposits in any other securities or property whatever than those designated in the order.

But, in addition, I think it may well be doubted whether a loan which is made for eleven months, and is then paid to answer a temporary purpose of the creditor, and as soon as that purpose is effected, is renewed or made again for the same period, can fairly be called a temporary loan. Subtle discriminations are generally delusive. The court, in such an affair as this, as well as in all others, must have regard to the substance of the matter, and allow its judgment to be controlled by the facts of the case rather than by artful and nice distinctions.

My conclusion is, that the loans to E. H. Harriman & Co. were made in violation of the order of the court, and constituted willful contempt of its authority.

The managers are charged with another act of contumacy. They are charged with having made a loan to Fisk & Hatch, in January, 1883, of \$1,700,000, contrary to the terms of the order. The terms on which this loan was made are stated in a letter written by Fisk & Hatch to Mr. Daniel Dodd, president of the institution, on the 29th of January, 1883. Fisk & Hatch, by the letter, say :

“Upon the understanding that the money now in our hands, belonging to your institution, is to remain with us right along, say for a year, except as any part of it may be sooner required to meet extraordinary or unexpected demands from your depositors, we have decided to mark back the rate of interest

Una v. Dodd.

to five per cent., as a permanent rate. It is understood, of course, that we are to keep, at all times, in your special box in our vaults, a sufficient amount of good securities to cover the amounts with ample margin."

Fisk & Hatch at this time owed the institution \$1,700,000, nearly one-third of the whole of the new assets. This sum was of sufficient magnitude to make even a person accustomed to control and dispose of millions conscious of his responsibility, and to impel him to exercise the utmost caution. The box mentioned in the letter as the special box of the institution, was not the property of the institution, but of Fisk & Hatch; they held the box, and the keys which locked and unlocked it; the box was kept in their vault; there no officer of the institution could enter without their leave; a simple no, without even closing the door of the vault, was all that was necessary, at any time, to put it completely beyond the power of the institution to reduce a single one of the securities held for this large sum of money to its possession, until after the debtors had had full opportunity to place them all beyond the reach of even judicial power. When the bonds which, according to the letter of the contract, were to stand as security for this loan, were set apart and put in the box, if such a thing was ever done, no one attended on behalf of the institution to see it done. The selection of the bonds, their arrangement and placing them in the box, were all intrusted to the borrowers. No one on behalf of the institution even stood by as a witness. The letter of the contract, it will be observed, promises security, to give a sufficient amount of good securities to cover the loan with ample margin. I shall not stop to inquire whether the manager who negotiated the loan notified the borrowers that nothing but United States bonds would be accepted as collaterals, and therefore understood, when the borrowers said that they would give good securities, that they meant good securities of the class or kind which he had told them would alone be accepted. I may, however, say that I think he was fully justified in believing that they meant by "good securities" such as he told them would alone be accepted. The letter of contract, as already stated, promises to give security, but it also provides that the collateral shall remain in the

Una v. Dodd.

possession of the debtors, and be subject to their control. On this point Mr. Dodd, who negotiated the loan, swears that Fisk & Hatch agreed to pay interest at the rate of five per cent. on the loan, provided the collaterals were left in their possession to be exchanged for other collaterals when necessity required. They, of course, to decide when the exchange should be made.

Was this an investment of the funds of the institution in accordance with the terms of the order, or a willful violation of the terms of the order? Was it even a loan on security?

The order, in plain terms, interdicted any use of the money received under it, which would be attended with the least hazard. The safe keeping and secure investment of all moneys received under it, were its primary and ultimate objects. These purposes were as conspicuous on the face of the order as was the fact that the order was written in the English language. This contract was still in full force when Fisk & Hatch suspended; they were still indebted to the institution in the sum of \$845,000; the special box was still in their vaults, but the box was empty, and the institution was without a penny's security. Fisk & Hatch had availed themselves of the control which their contract gave them over the collateral to deprive the institution of its security; true, not honestly, but fraudulently, but none the less effectually. When the contract of loan puts it in the power of the debtor, to deprive his creditor of the collateral pledged for the payment of his debts, it is an abuse of language to say that the loan is made on security. The only security the creditor has under such a contract is the honor of his debtor. If he is honest, he will not misappropriate the collateral he has pledged for his debt, let the temptation to do so be as strong as it may; if he is not, he will, whenever the temptation is strong enough to make it to his interest to do so; so that the matter stands in this wise: Under such a contract the creditor has security when he does not need it, but when he does, he has none.

Except for short intervals, the proofs show that the loan was wholly unsecured by any collateral whatever. There were no collaterals in the box nor anywhere else. Hatch swears that he is not aware that any securities had been laid out or designated

Una v. Dodd.

as collateral to this loan, but that the securities which were held in the office were considered held for that purpose. That is, that Fisk & Hatch considered that the securities in which they were constantly dealing, by sale, purchase, pledge and exchange, stood as security for this loan, but he also says that neither a part, nor the whole of them, had in any way been appropriated, marked, or set apart so as to show that the institution had any right to, or claim upon them. Nothing, in fact, had been done by either Fisk & Hatch or the institution, to give the institution any claim upon, or right to any property of Fisk & Hatch superior to that of any other of their unsecured creditors. A committee of the board of managers, called the auditing committee, were required by the by-laws of the institution to make a quarterly examination of the cash, securities and accounts of the institution, and to report their condition to the board. During the time this loan was outstanding it was necessary that this committee should go to the office of Fisk & Hatch, not only to examine the collateral pledged for this loan, but also to see that the United States bonds belonging to the institution, which the books of the institution showed were in the possession of Fisk & Hatch, were there. The proofs show that Fisk & Hatch always knew a few days in advance on what day this examination would be made, and in order to have the special box prepared for the inspection of the committee, they would direct their cashier to put in it such bonds as the state of their account with the institution required them to have there. The cashier swears that he usually received instruction, two or three days before the committee were expected, to prepare the box for their inspection, and that in making such preparation he would obtain from outside sources such bonds of the kind that Fisk & Hatch were required to have, as they did not have in the office.

In my judgment, it would be an abuse of language to say that this transaction was not a plain violation of the order under consideration. Such a transaction is, I think, without a precedent in the history of the modern business world. I cannot believe that a single officer of this institution would have loaned \$5,000 of his own money on the same sort of security to any borrower

Una v. Dodd.

whose personal integrity did not give him all the security he desired. This transaction is without a counterpart even in the history of the business dealings of this institution. Other loans on collateral security have been made, but in no other instance was the debtor allowed to retain possession of the collateral and to control it at his will.

Other contumacious violations of the order are charged against the managers, but as they may hereafter be made the subject of investigation in an action to compel the managers to make restitution of what the institution has lost in consequence of their misconduct, and as no consideration of primitive justice renders it necessary to deal with them now, I feel justified in deciding the case without expressing an opinion upon them.

The only question that remains for consideration is, Who committed the acts which have been adjudged to be contempts, or so far participated in their commission as to make himself responsible for them? The answer, so far as it concerns Daniel Dodd, is easy and unavoidable. He negotiated all three of the loans. The minutes of the finance committee, and also of the board of managers, fail to show that either loan was ever brought to the attention of either body, or that their concurrence in either was ever solicited or desired. All three transactions were negotiated and consummated without mention of either, before either body, when assembled as a committee or a board. Mr. Dodd swears, it is true, that he conferred with three members of the finance committee respecting the first loan to the Harrimans, made in April, 1883, but all the members of that committee, now living, swear that they never heard of it until after the loan was made. Some say they never heard of it at all, and those that admit knowledge of it say that it had been made long before they heard of it, and when it did come to their knowledge they were told that the collateral was government bonds. The clear and decided weight of the evidence, indeed almost the whole evidence, shows that all three of these loans were, in their inception and completion, the acts of a single individual. There is no proof which, in my judgment, will support a conviction of either of the other managers. It is true it is shown that three of the managers, namely,

Una v. Dodd.

A. Bishop Baldwin, Algernon S. Hubbell and Francis Mackin, knew that the order had been violated ; in other words, that they knew that part of the money secured under the order had been used in a manner prohibited by the order. They knew that the funds of the institution were being used for prohibited purposes, and in a manner which endangered their safety, and they did nothing to correct the abuse nor avert the danger, but they did not violate the order themselves nor abet nor aid another in doing so. They were unquestionably guilty of negligence, and it may be that their negligence was so gross as to render them legally liable for its pecuniary consequences. *Williams v. Halliard*, 11 *Stew. Eq.* 373. But mere negligence cannot, under such circumstances, be held to constitute contumacy.

Daniel Dodd must be adjudged guilty of contempt, but the order to show cause must be discharged, but without costs, as to the other managers.

It is not improper to state that the examination and consideration of this case have occupied much time and required great labor. The power which the court is called upon to exercise has been described as arbitrary, despotic and omnipotent. It is certainly a very strong power. The judgment of a court having authority to punish contempts, adjudging a citizen guilty of contempt, is final and unappealable. If the power is abused, or harshly or intemperately exercised, the victim is without redress. He may procure the judge to be impeached, but that will give him retribution, not redress. The power, however, is indispensable to the orderly and effectual administration of justice. Without it there are many instances in which a court would be powerless either to preserve order or to enforce obedience to its process, and it would always be within the power of a few lawless ruffians to interrupt and obstruct the proceedings of the highest court in the land, and transform scenes which should be characterized by the greatest order and solemnity into scenes of riotous tumult and disorder. The power is unquestionably necessary, but should be exercised only when absolutely necessary, always sparingly, and never without the utmost caution and deliberation. This case involved no consideration which made a

Lee's Executrix v. Dolan's Administratrix.

hasty decision either proper or desirable. It involved no claim for remedial justice. Whether the managers were convicted or acquitted would neither add to nor take from the fund to be distributed to depositors one penny. It involved no question of criminal law. This court has no power to inquire, either for itself or for any other tribunal, whether or not a crime has been committed, and any attempt by it to enter upon such inquiry would justly subject it to the reproach of officiously intermeddling in a matter entirely beyond its jurisdiction. The only question addressed to it in this proceeding is, Has its order been violated in such manner and under such circumstances as to make it its duty, for the purpose of maintaining its dignity and power, to punish the offender? The object of the proceeding is to do primitive justice. It has no other purpose. A judge who either hastens or falters in the discharge of any duty, under the stress of extraneous influence, come from what source it may, has neither the courage nor the independence necessary for the faithful discharge of his duties.

EXECUTRIX OF JOHN LEE, deceased,

v.

ADMINISTRATRIX OF MICHAEL DOLAN, deceased, et al.

1. An award cannot be extended beyond the things submitted; and even if the language of the submission be broad enough to cover a claim subsequently sought to be enforced, yet if it be clearly made to appear that the claim was not before the arbitrators, and was not passed upon by them, the award will not bar it.

2. A surviving partner who, in good faith and under an honest belief that he has a good defence, resists, by litigation, but unsuccessfully, the collection of a claim against the partnership estate, will be entitled to contribution for the reasonable expenses of the litigation as part of the expenses of winding up the partnership affairs.

On final hearing on original bill and answer, and cross-bill and answer, and proofs taken in open court.

Lee's Executrix v. Dolan's Administratrix.

Mr. R. H. McCarter and *Mr. Thomas N. McCarter*, for complainant.

Mr. T. F. McCormick and *Mr. Cortlandt Parker*, for defendants.

VAN FLEET, V. C.

This is a suit for contribution. Although it is brought by the representative of one deceased copartner against the representative of the other, it must be decided by the same legal principles which would control its decision if it had been brought by one copartner against the other.

John Lee and Michael Dolan, in September, 1869, formed a copartnership to do work as railroad contractors, not generally, but the particular work required by certain contracts. One of the contracts was for work on the New Haven, Middletown and Willimantic railroad. Dolan died intestate on the 1st of April, 1871. A suit was brought against Lee, as the surviving partner, in the superior court of the city of New York, in June, 1872. Judgment was subsequently entered therein, by default, in consequence of the inattention of the attorney employed by Lee to make defence. This judgment was opened in January, 1875, and Lee made defence. His defence was unsuccessful, and judgment was entered against him on the 2d of June, 1880. Appellate proceedings were afterwards taken, and the case removed to the court of appeals, where it was finally decided on the 31st of January, 1882, by a judgment of affirmance, by a vote of four judges to three. *Derham v. Lee*, 87 N. Y. 599. Lee's representative has since paid the judgment, and now, by this suit, asks that Dolan's representative and next of kin be compelled to make contribution of their moiety of the judgment and the expenses of the litigation.

Two defences are set up. First, that the complainant's right to contribution is barred by an award; and, second, that Lee, knowing that he had no defence to the claim on which the judgment was founded, causelessly, and from pure obstinacy, refused to pay a small sum in satisfaction of it, and should not, there-

Lee's Executrix v. Dolan's Administratrix.

fore, have contribution for more than one-half of the sum for which he could have settled the claim.

The first defence seems to be without the least foundation. An award or a report was made on the 29th day of August, 1873, by three persons, who, in the award, said that they were "the arbitrators in the matter of the accounts between John Lee and Ellen Dolan, administratrix of Michael Dolan, deceased." They found that Lee was indebted to the administratrix in a sum which they specified, and also that the partnership assets which remained in the hands of either of the parties, when collected or converted, should be equally divided between them. But who appointed them, or gave them authority to act as arbitrators, or what had been submitted to them, or upon what they were to arbitrate, does not otherwise appear. There can be no doubt, however, that the debt or claim which is the subject of the present controversy was not submitted to them, nor considered or passed upon by them. If the submission had embraced the accounts between the parties, or even all demands by either party against the other, it would not have extended to the present demand, for at the time the award was made this particular claim was unpaid and in dispute, and neither party had done anything in respect to it which gave him or her the least right to assert it against the other. Besides, it appears by a statement annexed to the award, just what claims and accounts were considered by the arbitrators, and also what claims and accounts entered into the computation by which they ascertained the balance or sum awarded to the administratrix. This claim is not among them.

An award cannot be extended beyond the things submitted. *Caldw. on Arb.* 321. And even if the language of the submission is broad enough to cover a claim subsequently sought to be enforced, yet if it is clearly made to appear that the claim was not before the arbitrators, and that they did not consider it, it has been held repeatedly that the award will not bar it. *King v. Savory*, 8 Cush. 309; *Webster v. Lee*, 5 Mass. 334; *Hodges v. Hodges*, 9 Mass. 320; *Smith v. Whiting*, 11 Mass. 445; *Bixby v. Whitney*, 5 Me. 192; *Buck v. Buck*, 2 Vt. 417.

The other defence must, I think, be tried by this rule: If Mr.

Lee's Executrix v. Dolan's Administratrix.

Lee, in refusing to compromise the claim and in resisting its collection, acted in good faith, believing he had a good defence to it—in other words, if he did what a man of ordinary prudence, acting for himself alone, would have done under similar circumstances—then he is entitled to contribution on the full amount paid, including reasonable expenses; but if, on the contrary, his conduct was the result of a foolish obstinacy; if, well knowing he had no defence to the claim, he causelessly refused favorable terms of compromise, and unrighteously resisted its collection, then he is entitled to none of the expenses of the litigation, and should only have contribution on the lowest sum for which the claim could have been compromised. Dolan contracted the debt on which the suit was founded. Lee did not know of its existence, or that it was asserted, until after Dolan's death. One William B. Jackson was the original creditor. He assigned his claim to Michael W. Derham, in whose name the suit in the superior court was brought. It was alleged that Dolan had employed Jackson to procure the contract for the work on the New Haven, Middletown and Willimantic railroad, and had agreed to give him, as his compensation for procuring the contract, two per cent. on all moneys earned under the contract. Lee defended on the ground that if such a contract had been made, it was Dolan's individual contract and not the contract of the firm. He swore, on the trial in the superior court, that he himself procured the contract for the work on the New Haven, Middletown and Willimantic railroad before Dolan and he became partners, and before there had been any negotiations between them on the subject of forming a copartnership. His statement was this: That he went to Middletown, Connecticut, and there went over and examined the ground on which the work was to be done, and at once made a contract to do the work; that while on his return journey home he met Dolan, who inquired of him whether he had obtained a contract, and on being told that he had, Dolan proposed that they should form a copartnership, he (Dolan) putting in his contract for the work which he was then doing on the New Jersey West Line railroad, and Lee putting in his contract which he had just made for

Lee's Executrix v. Dolan's Administratrix.

work on the New Haven, Middletown and Willimantic railroad, and that after some further talk they agreed to form a copartnership, but that prior to that time no suggestion or negotiation respecting the formation of a copartnership had ever passed between them. Taking these to be the facts which were before Lee's mind, and on which he was required to form a judgment whether to compromise the claim or not, I think it is impossible to say that in refusing to compromise he did not do what any prudent man, not too meek to yield to a demand which he knew to be unjust, would have done under like circumstances.

Moreover, the conduct of the claimant was strongly calculated to inspire suspicion of the justice of the claim. Lee was a man of considerable means, and could be compelled to pay all debts. The owner of the claim knew this, yet he offered to take \$500 for it. The claim at that time amounted to over \$2,500. The reason, the claimant says, he was willing to accept so trifling a sum in payment was, that he could not, at that time, get the evidence necessary to prove it. When and how he got the evidence, ultimately, to prove the claim, does not appear. The case was originally heard in the superior court by a referee. The reference was made February 26th, 1875, within less than two months after the judgment was opened, but the referee did not report until May 12th, 1880. The claimant allowed the case to linger before the referee for over five years.

Lee's conduct must be tried, not by what we know now, but by what Lee knew when he was called upon to act. Dolan's lips were sealed in death. Lee, so far as appears, never heard him speak of this claim. He had nothing to guide him, in deciding what he should do, but what he knew himself. Taking, as I think we must, what he said under oath as true, there can be no doubt that his conduct in refusing to compromise, and also in resisting the enforcement of the claim, was not only reasonable, but unavoidable. On Dolan's death the firm became dissolved, and in consequence of its dissolution it became the duty of Lee, as survivor, to collect in the assets of the firm, pay the debts of the firm, and divide the surplus with Dolan's representative. In the performance of these duties, Lee was a trustee

McCartin's Executors v. Perry's Executor.

so far as Dolan's estate was concerned, and he was bound to see to it that no debt was allowed against the partnership estate which he knew, or had just reason to believe, was not justly chargeable against that estate. In this particular case, it is true, to have allowed the debt against the partnership estate, even if it was not properly chargeable to that estate, would have helped rather than harmed Dolan's estate, but that fact does not alter the rule of law. If Lee was satisfied, from facts within his own knowledge, that the claim was not a debt of the partnership, it was his duty to resist its collection. The proof is clear that he was so satisfied. The expenses he incurred in resisting the claim constitute part of the expenses of winding up the partnership estate, and must be borne and defrayed in the same manner that other expenses incurred for the same purpose are borne and defrayed.

The complainant is entitled to a decree, with costs.

THE EXECUTORS OF MYLES MCCARTIN, deceased,

v.

THE EXECUTOR OF EMMELINE N. PERRY, deceased, et al.

The right to recover property conveyed in fraud of creditors by a debtor subsequently adjudicated a bankrupt, is vested in his assignee alone, and the failure of his assignee to bring an action to recover the property within the time limited by the bankrupt law, does not transfer the right to bring such action to the creditors of the bankrupt.

On final hearing on bill and answer and proofs taken in open court.

Mr. S. Howell Jones and *Mr. Thomas N. McCarter*, for complainants.

Mr. Albert P. Condit and *Mr. John R. Emery*, for defendants.

McCartin's Executors v. Perry's Executor.

VAN FLEET, V. C.

The object of this suit is to reach certain moneys, the proceeds of the sale of lands alleged to have been conveyed by a debtor in fraud of his creditors. The complainants were judgment creditors of Nehemiah Perry, now deceased. Their debt was contracted in 1870, and they recovered a judgment for it in 1877. The amount still remaining due exceeds \$28,000. Perry, in 1874, through a third person, conveyed certain lands at Long Branch to his wife, Emmeline N. Perry. Mr. and Mrs. Perry both died on the 1st day of November, 1881. Mrs. Perry left a will, which was admitted to probate, and under authority of which her executor sold the lands at Long Branch. He now has in hand nearly \$6,000 of the proceeds of the sale. The object of this suit is to reach that money, and have it applied in part payment of the complainants' judgment. Among the defences set up is one denying the capacity or right of the complainant to maintain this action, and insisting that, if the cause of action on which the complainants' bill is founded, exists, the right to sue upon it is vested in another person, to the exclusion of the complainants and all other persons. If this defence is entitled to prevail, it ends the case, and renders it wholly unnecessary to consider the question whether the deeds alleged to be fraudulent have been shown to be so or not.

Nehemiah Perry was, on his own petition, adjudged a bankrupt on the 14th day of May, 1878, and, on the 10th of June following, his property was assigned, in conformity to the bankrupt law, to an assignee in bankruptcy. This assignment, it is insisted, invested the assignee with all property conveyed by the bankrupt in fraud of his creditors, and consequently that the assignee is the only person who can maintain an action either to recover the property fraudulently conveyed, or to invalidate the conveyances by which it was conveyed. The defence, it will be perceived, raises a question of federal law, on which this court must follow the decisions of the supreme court of the United States.

The bankrupt act declares that all property conveyed by a bankrupt in fraud of his creditors, as well as all property be-

McCartin's Executors v. Perry's Executor.

longing to him, shall, in virtue of the adjudication of bankruptcy and the appointment of an assignee, vest, at once, in the assignee (*U. S. Rev. Stat. § 5046 p. 981*); and also limits the time within which the assignee may bring any action touching property or rights vested in him, to two years from the time when the cause of action accrues to him. *Id. § 5057 p. 982*. The district courts of the United States are, by the act, constituted courts of bankruptcy, and full and complete original jurisdiction in all matters and proceedings in bankruptcy conferred upon them. Their jurisdiction extends to the collection of all assets of the bankrupt, and to all cases and controversies between the bankrupt and any of his creditors. *Id. § 4972 p. 969*. The purpose of these provisions is manifest. They were intended to strip the bankrupt of all his property and property rights, and invest his assignee not only with the bankrupt's property, but also with the right of his creditors to recover any property which he may have conveyed in fraud of their rights. The object intended to be accomplished, by thus investing the assignee with the rights of both the bankrupt and his creditors, was to secure an equal distribution of the bankrupt's property, of every kind, among his creditors. An adjudication of bankruptcy and the appointment of an assignee, therefore, create a trust in favor of creditors. By force of the adjudication, his right and theirs to his property, and their right to avoid his conveyances made in fraud of them, all vest in the assignee for the benefit of his creditors, and there they must remain until the purposes of the trust are fully accomplished. An adjudication of bankruptcy is just as effectual against creditors as it is against the bankrupt himself. It strips him of all his property, exempts him from liability to suit by his creditors, and limits the right of his creditors to equality in distribution of his assets. This limitation I understand to be one of the fundamental principles of the bankrupt law. It follows, necessarily, that by an adjudication of bankruptcy the creditors of the bankrupt are deprived of all direct remedy against the bankrupt, and also against any property which he may have conveyed away in fraud of them, and

McCartin's Executors v. Perry's Executor.

that all such remedies are, by operation of law, vested in the assignee, who alone can enforce them.

A different rule seems to have prevailed in Virginia. Under the bankrupt law of 1841, the court of appeals of Virginia held that if the assignee of a bankrupt did not, within the time limited by that act, bring an action to recover property which the bankrupt had conveyed in fraud of his creditors, any judgment creditor of the bankrupt might, after the assignee's right of action was barred by lapse of time, maintain an action in his own name to recover such property. This result was reached by the following argument: That while it was true, there was an interval of time during which an exclusive right of action for such a purpose was vested in the assignee, and during which no creditor could sue, yet when that period had expired, and the assignee's right to sue had terminated by lapse of time, the creditor, whose right of action had not been wholly extinguished, but merely suspended, was remitted to his rights as they stood before the adjudication of bankruptcy. *Tichenor v. Allen*, 13 Gratt. 15. And the court of appeals of New York have, in dealing with the recent bankrupt law, adopted a similar view. They declared that if an assignee in bankruptcy should neglect or refuse to reclaim property fraudulently transferred, the creditors might maintain an action to recover it, and if it was recovered the creditor prosecuting the action would be entitled to the benefit of the property. *Dewey v. Moyer*, 72 N. Y. 70. But these decisions stand in direct conflict with those of the supreme court of the United States. That court has declared that the right to bring an action to recover property conveyed by a bankrupt in fraud of his creditors, is vested in his assignee alone, and that the failure of the assignee to sue within the two years allowed by the bankrupt law does not transfer this right of property or right of action to the creditors of the bankrupt. *Moyer v. Dewey*, 103 U. S. 301; *Trimble v. Woodhead*, 102 U. S. 647; *Glenny v. Langdon*, 98 U. S. 20. In the second case cited—*Trimble v. Woodhead*—Mr. Justice Miller says: "The primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt of every kind among his creditors. This

McCartin's Executors v. Perry's Executor.

can only be done through the rights vested in the assignee and by the faithful discharge of his duty. Let us suppose, however, that a creditor is aware of the existence of property of the bankrupt sufficient to satisfy his own debt, which has not come to the possession or knowledge of the assignee. He has but to keep silent for two years, and then bring suit in his own name against the fraudulent holder of this property, and make his debt really at the expense of the other creditors ; or, he may have an understanding with the bankrupt, who, after two years, and after his own discharge from all his debts, may confess judgment to this creditor and furnish him the evidence to prove the fraud, and thus secure him a preference forbidden by the act itself."

Another legal obstacle would seem to stand in the way of the complainants' success in this suit. An assignee in bankruptcy is the trustee of all the creditors of the bankrupt. A creditor may prove his debt at any time before the final distribution of assets is made. The supreme court of the United States hold that whenever a right of action, vested in a trustee, is barred by the statute of limitations, the right of the *cestui que trust*, represented by the trustee, is also barred. *Meeks v. Olpherts*, 100 U. S. 564. This doctrine has been applied to a right of action vested in an assignee in bankruptcy, and it has been held that if the right of action by the assignee is barred, the title of the alleged fraudulent grantee is unimpeachable by the creditors of the bankrupt. *Trimble v. Woodhead*, *supra*.

But it is argued, on behalf of the complainants, that an assignee in bankruptcy is only the trustee of such creditors of the bankrupt as prove debts against his estate, and that if no debts are proved he is not the trustee of the creditors but of the bankrupt alone, and that no evidence has been offered in this case showing that a single debt was proved against the bankrupt's estate. If this reasoning be conceded to be sound, it does not, as it seems to me, remove the complainants' difficulty. As already shown, an adjudication of bankruptcy and the appointment of an assignee, invest the assignee with the sole right of recovering property conveyed in fraud of creditors. He is invested with this right for the benefit of all the creditors of the bankrupt, the

Chetwood v. Berrian.

design being to place them all on an equal footing. They may avail themselves of it or not, as they please, but they cannot, by refusing to prove their debts, defeat the law and divest the assignee of this right and transfer it to themselves. Besides, I am compelled to say that I know of no rule of law which, in a case like this, where there is no evidence either way, would justify the court in presuming that no debt had been proved against the bankrupt's estate. On the contrary, it would seem to me, in view of the fact that there were creditors, that a trust was raised in their favor, and that all they had to do to entitle themselves to the benefit of it was to prove their debts; that if presumptions are indulged in at all, it should be in favor of that course of conduct on the part of the creditors which would be the most probable and natural under the circumstances.

The complainants' bill must be dismissed, with costs.

GEORGE R. CHETWOOD

v.

THOMAS B. C. BERRIAN et al.

1. In 1872 complainant gave to an agent written authority "to assign, satisfy or discharge all mortgages made to him." The agent, thereunder, assigned to the defendant a mortgage of \$10,000, declaring that the assignment was for the benefit of complainant. The agent applied the \$10,000 to his own use.—*Held*, that complainant was bound by the assignment and the agent's concomitant declarations; the defendant testifying that he had no knowledge of the agent's fraud.

2. The assignment was made in December, 1879. The mortgage was afterwards foreclosed, the premises bought by the agent, and conveyed to the defendant in July, 1881. The complainant, who was then in Paris, was notified thereof in October, 1881, and returned to this state in April, 1882. He lived continuously thereafter, until April, 1883, with his agent, who informed him fully as to this transaction. He filed his bill in June, 1883.—*Held*, that his delay constituted a ratification and an estoppel as against defendant.

Chetwood v. Berrian.

On final hearing on bill and answer, and proofs taken in open court.

Mr. Robert E. Chetwood, for complainant.

Mr. John R. Emery, for defendant Berrian.

VAN FLEET, V. C.

The complainant seeks to obtain a decree against the defendant Thomas B. C. Berrian, declaring that he holds certain lands in trust for complainant, and directing him to convey them to complainant. The complainant puts his right to this relief on the ground that Berrian, as against him, acquired title to the lands in question by fraud. The complainant's case, briefly stated, is this: that his agent, to secure his own debt to Berrian, assigned a mortgage made to the complainant, and standing in complainant's name, to Berrian, afterwards foreclosed the mortgage, procured the mortgaged premises to be sold, purchased them himself, and then conveyed them to Berrian. The strength of the complainant's case, as thus stated, it will be perceived, consists in the fact that Berrian accepted, as a pledge for the personal debt of the agent, a security which on its face showed that it was the property of his principal.

The complainant on the 25th of September, 1866, by writing under his hand and seal, constituted John Chetwood his attorney in fact, with power to bargain, sell and convey his lands situate in the cities of Newark and Elizabeth; also upon payment to satisfy, discharge and cancel of record all mortgages held by him upon property in the states of New York, New Jersey or Michigan, and also to assign such mortgages and the bonds secured thereby; also to collect all dividends which might be declared by any corporation in which he was a stockholder, to vote for him at any election or meeting of stockholders of such corporations, and to take any action in such corporations which he might see fit. Soon after the execution of this power of attorney, the complainant went to Paris, France, where he remained until 1870. In that year he returned to New Jersey, taking up his

Chetwood v. Berrian.

residence at Elizabeth, where he had resided before going to Paris. He remained there until June 8th, 1872, when he again left for Paris. He remained in Paris on this last occasion until April, 1882. The day before he left for Paris the last time—June 7th, 1872—the complainant executed another power of attorney to the same person, giving him enlarged powers. By this last instrument he gave his attorney power to sell, convey or lease all his real estate in any one of the United States; to assign, satisfy or discharge all mortgages made to him on property in any one of said states; to sell and transfer all stocks in any joint stock corporation or association standing in his name; and for those purposes, to execute all necessary deeds and instruments, giving and granting unto his attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the principal might or could do if personally present, with full power of substitution and revocation. The appointee was the complainant's nephew, a lawyer by profession, and in successful practice in the city of New York, and also a member of the New Jersey bar. The complainant was a man of wealth. He estimated his fortune, at the time when he executed the last power of attorney, at \$230,000, of which more than four-fifths consisted of personal estate. The complainant is a physician by profession, and when he went to Europe in 1866 was over sixty-four years of age. His object in going to Paris, in would seem, was not to pursue his profession, nor to engage in any business, but to enjoy his fortune, and live a life free from care and labor. All his securities were left with his attorney, who collected the income of his whole estate, paid his taxes, and made such other disbursements as were necessary, and from time to time made such remittances to the complainant as he required. The control exercised by his attorney over the complainant's estate was general, complete and exclusive. He was continued in power after the complainant's return in 1870. The power of attorney executed in 1866 was not revoked, and the bond and mortgage subsequently assigned to Berrian, were taken to secure a loan

Chetwood v. Berrian.

made by his attorney for the complainant in 1871, while he was still in this country.

The transaction which gave rise to this suit took place in December, 1879, in the city of New York. The defendant Berrian is a man of small fortune, consisting of about \$20,000, and an invalid. He resided in Europe continuously from June, 1872, until September, 1879. He went there for medical treatment. Prior to December, 1879, the complainant's attorney had pledged the bond and mortgage subsequently assigned to Berrian, as security for a loan made to him by the Germania Insurance Company. When that loan fell due, the complainant's attorney applied to Berrian for a loan of \$10,000 for the complainant, offering to assign the bond and mortgage under which the title in question was made, with others, as collateral security, and stating that he had written authority to act for the complainant in the matter. The attorney swears that Berrian made the loan upon his representation that it was for the complainant, and that he so understood the transaction at the time, as the money was required to release the complainant's securities from a previous pledge. His evidence on this point is uncontradicted. The money obtained from Berrian was used to pay the insurance company, and to release the bond and mortgage subsequently assigned to Berrian from the claim of the insurance company. But the money obtained from the insurance company was used by the complainant's attorney for his own purposes, in fraud of his principal. He has purloined and squandered nearly the whole of the complainant's personal estate.

The case made by the bill is not proved. The vital fact of the complainant's case, as stated in his bill, is that Berrian, to secure a debt due from the attorney, in his individual capacity, to him, accepted a mortgage which he knew belonged to the complainant. If that fact had been established, the case would have been free from the least doubt. Berrian would then have been shown to have been a conscious and willing participant in the attorney's fraud, and would not have been permitted, as against the complainant, to have kept any of the fruits of the fraud. But that is not the case. On the contrary, it is undis-

Chetwood v. Berrian.

puted that the complainant's attorney, availing himself of the position in which the complainant had placed him, and of the authority with which the complainant had apparently clothed him, has obtained Berrian's money under a representation that he was acting for the complainant, and that the complainant was the borrower. In this condition of affairs, the important question is, Who shall bear the consequences of the attorney's fraud—his principal, or an innocent third person who dealt with him in good faith? It is an elementary principle of the law of agency that a principal is bound by all the acts of his agent within the scope of the power which he has conferred upon his agent. And this includes not only the particular act which the principal has expressly authorized, but also whatever is usually done, in the ordinary course of business, in the performance of that act. Very broad powers were conferred in this case. It would be difficult to select more comprehensive terms, or to state them in a more unrestricted form. These are the words used by the complainant in granting power to his attorney :

“To assign, satisfy or discharge all mortgages made to him.”

It will be observed that the words are not “to sell and assign,” nor “upon payment to satisfy or discharge,” but both powers stand entirely unlimited and unrestrained, in their broadest form, and must, therefore, receive a construction commensurate with the breadth of the terms used. A grant of a power “to assign,” standing wholly unrestrained, and without any limitation whatever upon its exercise, is broad enough to authorize an assignment to secure a loan made for the benefit of the grantor of the power. When a principal confers power by terms so uncertain as to be susceptible of two different constructions, and the agent in good faith adopts the one least favorable to his principal, the principal cannot repudiate the acts of his agent as unauthorized because he meant the terms to be read in the other sense. *Ireland v. Livingston, L. R., 5 Eng. & Irish App. (H of L.) 395, 416.* A power “to sell and assign” will not authorize an agent to pledge the property of his principal, for in such case the terms

Chetwood v. Berrian.

themselves exclude the idea of any other disposition than a sale out and out.

Under a power so general and comprehensive, and so entirely free from all restriction or limitation whatever, as that granted by the complainant in this case, the attorney may, I think, do anything with a mortgage which may be effected by an assignment. The only limitation on his power, under such a comprehensive grant, is that he must use the power for the benefit of his principal. In no case can an agent use the power conferred upon him for the benefit of any other person than his principal, except his authorization gives him express permission to do so. But while this is true, it is also true that if an agent, while doing an act which his principal has authorized him to do, represents that he is doing it for his principal, but it should turn out that his representation was false, and the result should show that he did the act for himself, his principal would nevertheless be bound. The contract in this case was made in the state of New York, and it was to be performed there; its validity and construction must, therefore, be determined by the law of that state. Now, it has long been the law of that state that whenever the act of an agent is authorized by the terms of the power constituting him an agent, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, the act is, as to all persons dealing with the agent in good faith, the act of the principal. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is as to them the real authority. This rule was first declared in *North River Bank v. Aymer*, 3 Hill 262. That case, it is said, was afterwards reversed by the court of errors, and that the reversal proceeded on the ground that the legal rule above stated was erroneous. The opinion, however, of the court of errors has never been reported, and the history of the case here given will be found in the dissenting opinion of Judge Comstock, in *Farmers and Mechanics Bank v. Butchers and Drovers Bank*, 16 N. Y. 154. But the doctrine declared in *North River Bank v. Aymer* has since been repeatedly affirmed by the court of appeals of New York, and is now the established

Chetwood v. Berrian.

law of that state. *Farmers and Mechanics Bank v. Butchers and Drovers Bank*, 16 N. Y. 125; *Griswold v. Haven*, 25 N. Y. 595; *Exchange Bank v. Monteath*, 26 N. Y. 505; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Westfield Bank v. Cornen*, 37 N. Y. 320. In two of the cases above cited, it is said that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it.

My conclusion is, that the act of the attorney in this case was within the power with which his principal had invested him, and that his principal is bound by his declaration as to his object in exercising the power.

But if a different result had been reached on this branch of the case, and it had been found that the attorney's act was unauthorized, still I think the complainant would not have been entitled to relief. The lands in question were conveyed to Berrian in July, 1881. The complainant was notified of the conveyance in October, 1881, and he says on receiving such notice he made up his mind to come to America; but, after reflection, he concluded to postpone his return until the following spring, as he usually suffered a great deal on a sea voyage, and they were always tempestuous in the winter season. So far, perhaps, there is nothing which would justify the court in saying that the complainant was bound, if he believed his attorney had exceeded his authority, to disown his act without delay, or otherwise be concluded by it. Inaction or silence by a principal will never have effect to ratify the unauthorized act of his agent, unless it is shown that the principal did nothing or said nothing after he was fully informed of what his agent had done. So far, all we know is that the complainant, on receiving notice that a conveyance had been made to Berrian, desired to return to America, but was deterred from doing so by fear of personal discomfort,

Chetwood v. Berrian.

and that he remained in Paris until the following April, without, in the meantime, seeking any information of his attorney, respecting the conveyance to Berrian. The complainant, on his return to this state in April, 1882, went to the residence of his attorney at Elizabeth, and took up his abode there, and continued to reside with him until April, 1883. He admits that his attorney, in May, 1882, gave him full information in writing respecting his transactions with Berrian, and also told him that he had spent all his personal estate. The bill in this case was not filed until June 23d, 1883. Up to that time the complainant had, in no way, indicated that he thought the act of his attorney, in this particular transaction, was in excess of his power, or that he intended to repudiate it. On the contrary, his daily conduct, for nearly a year after he was in full possession of all the facts, constantly gave the very strongest assurances that he had condoned the faults and crimes of his nephew, and meant to stand by his acts. For nearly a year after he was fully acquainted with his nephew's frauds, he remained a member of his nephew's family, daily associating with him as a reputable citizen, and taking no step either to obtain justice for himself or to bring his nephew to justice. If his purpose in this course of conduct was, by gentle means and seeming to forgive, to procure re-imbursement for his losses to the extent of his nephew's property, and then, when he had got all he could get out of him, disown and repudiate his nephew's act, and attempt to compel those who had dealt with his nephew, as his representative, in good faith, to respond to him for his nephew's wrongs, his laches should, on the plainest principles of justice, be held to be fatal to his purpose.

The rule is settled that where the silence of a principal may cause loss to a third person, or give him an advantage, he must, without unreasonable delay after the fact comes to his knowledge that his agent has exceeded his authority, disown his agent's act and afford the other party an opportunity to protect himself, or he will make his agent's act his own. *1 Chit. on Cont.* (11th Am. ed.) 291; *Bendict v. Smith*, 10 Paige 126; *Vianna v. Barclay*, 3 Cow. 281. In *Cairnes v. Bleecker*, 12 Johns. 300, Judge Spencer said: "It is a salutary rule, in relation to

Farmer's Executor v. Farmer.

agencies, that when the principal is informed of what has been done [if his agent has exceeded his authority], he must dissent, and give notice in a reasonable time, or otherwise his assent to what has been done shall be presumed." In that case silence for less than four months was held to constitute a ratification.

The complainant's bill, as against Berrian, must be dismissed, with costs.

THE EXECUTOR OF GEORGE FARMER, deceased,

v.

ELIZABETH H. FARMER et al.

1. The legislation of this state, enlarging the capacity of a married woman to acquire and dispose of property, does not give her capacity to make a legal contract with her husband.

2. A wife may bestow her property, by gift, on her husband, or she may make a contract with him which will be upheld in equity, but the courts always examine such transactions with an anxious watchfulness and dread of undue influence.

3: Where a contract is made by parties holding confidential relations, so that it is probable that they did not deal on terms of equality, but that unfair advantage might have been taken by the stronger party of the weaker, there the burden, if the contract is assailed, rests on the stronger party to show that no advantage was taken, otherwise fraud will be presumed.

On final hearing on bill and answer, and cross-bill and answer, and proofs taken in open court.

Mr. Frank B. Colton and *Mr. John W. Taylor*, for complainant.

Mr. William B. Guild, for defendants.

VAN FLEET, V. C.

This suit is brought by William H. Peek, one of the executors of the last will and testament of George Farmer, deceased, against

Farmer's Executor v. Farmer.

Elizabeth H. Farmer, his co-executor, and also against Eli H. Reynolds and James N. Duffy, who, together with the complainant's co-executor, were on the 10th of May, 1881, carrying on business, as copartners, under the name of Reynolds, Duffy & Co. The object of the suit is to procure a decree declaring whether a certain promissory note constitutes part of the estate of the testator, or is the individual property of Elizabeth H. Farmer.

The material facts may be summarized as follows: Elizabeth is the widow of the testator. She and the testator were married on the 18th of February, 1874. At the date of their marriage she was the owner of considerable property, and a member of a partnership engaged in the manufacture of leather. The principal part of her property consisted of the capital she had contributed to the partnership, and of the real estate used by the partnership. The latter she owned in severalty, and let to the firm at a rent of from \$10,000 to \$12,000 a year. In May, 1874, Mrs. Farmer gave the testator a power of attorney, authorizing him to manage and conduct her business, and to do, generally, all things pertaining thereto. Under this authority the testator conducted all his wife's transactions with the firm up to the time of his death, which occurred on the 27th of July, 1883. The firm paid him the rent of the lands they held under her, and also her share of the profits of the business. On the 10th of May, 1881, the firm made a note, payable on demand, after date, to the order of Mrs. Farmer, for \$12,478, for her share of the profits of the business up to the preceding January. This note, endorsed by Mrs. Farmer, was found among the testator's papers after his death, and is the subject of the present controversy.

The bill alleges that the note was endorsed to the testator for a good and valuable consideration, and thereby became his property. Mere possession by an endorsee of a negotiable note, regularly endorsed by the payee, is, in ordinary cases, all that is required to make a complete case for the endorsee. Here, however, the parties were, in consequence of their matrimonial connection, incompetent to enter into a legal contract with each other.

Farmer's Executor v. Farmer.

Notwithstanding the capacity of a married woman to acquire, use and dispose of property has been very greatly enlarged, still the statute making the enlargement declares, "Nor shall anything herein enable husband or wife to contract with or to sue each other, except as heretofore." *Rev. p. 639 § 14.* The purpose of this provision has been defined. Chief-Justice Beasley, speaking for the supreme court, says its "object was to leave the husband and wife, touching their capacity to bargain together, on the ancient footing of the common law. The clause is virtually a legislative declaration that, as heretofore, they may enter, *inter sese*, into equitable agreements, but not into legal agreements. It was obviously intended that the court of equity should, as it had always done prior to the amplification of the rights of the wife, exercise a supervision over the engagements of married persons." *Woodruff v. Clark, 13 Vr. 198.* At common law, husband and wife were one person, so that neither could give the other any estate or interest. *Co. Litt. 188 a.*

But had the testator held the note by endorsement from a person competent to contract with him, still, I think, in view of the fact that he was the attorney of the endorser, managing and conducting all her business, and receiving and disbursing all her moneys, her endorsement would, under the circumstances, furnish no evidence whatever that the note was his property. The evidence shows that he took complete charge of all her business; he received all her moneys and made all her disbursements, and held in his hands, at all times, all her moneys, except such inconsiderable sums as she required from time to time for pocket-money. Except her pocket-money, her unexpended balances were, at all times, in his hands. He was her banker as well as her agent, so that it will be perceived, unless the proceeds of the note in question were to be dealt with in a manner very different from his other receipts for her, the note would, in regular course, be endorsed to him, not for his use, but for hers. Without her endorsement he could not use it, as he was accustomed to use other notes made by the firm for debts due to her. Her endorsement, therefore, under the circumstances, furnishes no evidence whatever that the note was his property.

Farmer's Executor v. Farmer.

But the complainant claims that the endorsement, considered in connection with other facts, shows either a gift of the note or a transfer of it, under such circumstances as to make it the property of the testator. The bill, as already stated, puts the complainant's right to the note on the single ground that it had been endorsed to the testator for value; no right by gift is claimed, but Mrs. Farmer makes a counter-claim by cross-bill, alleging that the note came to the hands of the testator as her agent, and remained her property at the time of his death, so that it will be seen that it is the duty of the court, under the issue thus raised, to decide which of the two adverse claimants is entitled to the note.

The evidence respecting the circumstances under which the endorsement was made is very unsatisfactory. We know that the note was given for a debt due to Mrs. Farmer, and that it was made payable to her by the special direction of the testator, and that such direction was a departure from the course almost uniformly pursued by him in making collections for her. In every other instance but one, his collections for her were made by check or note payable to himself, without in any way disclosing on their face his agency. We also know that the contract of transfer, that is, the words "Pay George Farmer or order," appearing on the back of the note, are in the testator's handwriting, and that the signature of Mrs. Farmer under them is in her own proper handwriting. Besides these facts, we have nothing whatever tending to show the circumstances under which the endorsement was made, except what may be found in the evidence offered to show admissions by Mrs. Farmer. A sister-in-law of the testator testifies that some time prior to the testator's death, Mrs. Farmer said she was in great trouble—her husband had asked her to sign a note for \$12,000, and she had signed it and was very sorry for it. The complainant testifies that a few days before the testator's death, Mrs. Farmer told him that on the day she signed the note, the testator said to her he was going to speak to her about a matter that it was unpleasant for him to mention; he then said that he wanted her to give him this note for his services; that he got the pen and ink and

Farmer's Executor v. Farmer.

placed them with the note on a table before her, and asked her to sign the note, and she did so. That she subsequently became troubled about what she had done, and told the testator so, when he replied that she need not bother herself about the note, as it was out of the way. She also said that she did not think it was honest in the testator to ask her to sign the note. On the day the testator's personal estate was inventoried and appraised, she refused to consent to an appraisal of the note as part of his estate, stating that he had no right to it, that she had signed it at his solicitation and was sorry for it. She also said that she was surprised to find the note was in existence, as the testator had told her it was destroyed. A niece of the testator, and the wife of the complainant, testifies that some weeks after the testator's death, Mrs. Farmer said to her that the testator had asked her to sign a note, and she had asked him what for, and that he had replied that it was a note for profits of the business, to which he thought he was entitled for his services, and that she had then signed it, but she did not think he was entitled to it.

These are the facts on which the title to the note must be decided. The whole of the admissions of Mrs. Farmer must be considered—what she said in favor of her interest, as well as what she said against her interest. Such evidence is received in courts of justice on the ground of the probability of the truth of an admission against interest, but, in order to determine the meaning of an admission, and to give it no greater effect than it is fairly entitled to, the whole of what the person said who made the admission must be considered. *Fox v. Lambson*, 3 Hal. 275; 1 Greenl. Ev. § 201.

A wife may bestow her property by gift on her husband, or she may make a contract with him which will be upheld in equity, but such transactions are always examined by courts of equity with an anxious watchfulness and caution, and dread of undue influence; and if they are required to give sanction or effect to them, they will examine the wife in court, and adopt other precautions to ascertain her unbiased will and wishes. 2 Story's Eq. Jur. § 1395; Clancy M. W. 347; 1 Bishop M. W. § 719; Grigbley v. Cox, 1 Ves., Sr., 517.

Farmer's Executor v. Farmer.

Gifts by a wife to her husband, says Chancellor Kent, are to be closely inspected on account of the danger of improper influence, but if they appear to have been fairly made, and to be free from coercion and undue influence, they ought to be sustained. *Bradish v. Gibbs*, 3 Johns. Ch. 523. The reason of the rule is manifest. The confidence of the marriage relation is so complete, and the trust of the wife in the honor, good faith and love of her husband is generally so perfect, that in all business affairs she depends upon him, and suffers herself to be controlled by his judgment. Unless, therefore, the court, in the language of Lord Eldon, watches transactions between parties thus situated, where fraud may be committed with such facility and its discovery may be so easily baffled, with a jealousy almost invincible, it will oftener lend its assistance to fraud than punish the fraud-doer. *Hatch v. Hatch*, 9 Ves. 292.

But the testator stood in another relation of confidence to his wife. He was her agent, having general and complete control of all her business affairs. As her agent, he was bound, in all his dealings with her, to practice towards her the utmost good faith. A contract made by an agent with his principal, in relation to the subject-matter of the agency, will not be allowed to stand, unless it appears that it is entirely free from undue influence, advantage and imposition. The transaction must be characterized by the utmost good faith. There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent which might influence the principal; and the burden of establishing the perfect fairness of the contract is upon the agent. *Condit v. Blackwell*, 7 C. E. Gr. 481; *Porter v. Woodruff*, 9 Stew. Eq. 174. The same principle has been declared in many other cases. *Tate v. Williamson*, L. R. (1 Eq.) 528; *S. C. on Appeal*, L. R. (2 Ch. App.) 55; *Rhodes v. Bate*, L. R. (1 Ch. App.) 252; *Billage v. Southec*, 9 Hare 534. Perhaps the most accurate and comprehensive statement of it is that given by Judge Hand, in *Cowee v. Cornell*, 75 N. Y. 91. He said: "It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not to be presumed, but must be proved. Whenever, however,

Farmer's Executor v. Farmer.

the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side, from superior knowledge of the matter derived from a *fiduciary* relation, or from overmastering influence, or, on the other, from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, the transaction is presumed void, and it is incumbent on the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood."

Now, two facts, if the whole evidence is credited, are entirely clear. First, that Mrs. Farmer did not pass the note to the testator as the free and uncontrolled expression of her will, but solely because he wanted her to do so, and against her will, because, as soon as she thought she comprehended what she had done, she regretted her act, and wanted to undo it. And second, that Mrs. Farmer did not fully understand what she was doing when she endorsed the note. She evidently thought she had signed a note as maker. This would seem to be very clear, from the fact that when the testator told her she need not bother herself about the note, it was out of the way, she was satisfied, because she thought it was destroyed; yet, if she had clearly understood what she had done, she would have been more troubled by the thought of the destruction of the note than that her husband had obtained it from her unfairly.

The proofs, in my judgment, entirely fail to show that the note was endorsed to the testator, for the purpose of investing him with title to it for his own use, and Mrs. Farmer is, consequently, entitled to a decree declaring the note to be her property.

Trenton Board of Health v. Hutchinson.

THE STATE, THE BOARD OF HEALTH OF THE CITY OF
TRENTON, relator,

v.

JOHN P. HUTCHINSON AND ALEXANDER JACOBUS.

The former owner of a hotel in Trenton applied to the common council of the city, and obtained, by ordinance, permission to lay a drain and sewer-pipe from the hotel through a street to a small natural stream of water. The ordinance contained a provision, that if such pipe should become a nuisance (upon which the opinion of the common council should be final and conclusive), the owner, his heirs or assigns, would remove it. The hotel is now owned by one of the defendants, the other being his lessee. The board of health of the city of Trenton filed a bill, in the name of the state, to enjoin the use of the pipe for discharging the filth of the hotel into the stream, as a nuisance detrimental to public health; and the evidence shows that its use is a public nuisance.—*Held*, that the injunction should be allowed, although other persons also discharged their filth into the stream; and although the statutory requisites as to the organization of boards of health had not been strictly complied with by complainants; and although the ordinance had never been repealed, and the defendants insist that the license thereby granted is in the nature of a contract and irrevocable.

Mr. James Buchanan and *Mr. G. D. W. Vroom*, for complainant.

Mr. William M. Lanning, for defendants.

BIRD, V. C.

In 1876, Bartlett being the owner of the premises in the city of Trenton known as the "American House," applied to the common council for permission to lay a drain-pipe from said premises, through West Hanover street to Petty's run. The council passed an ordinance giving him such permission. One section of the ordinance provided that if such pipe should become a nuisance, or injurious or dangerous to the public, upon which the opinion of the council should be final and conclusive,

Trenton Board of Health v. Hutchinson.

the said Bartlett, his heirs or assigns, should cause the same to be removed, and if he did not remove it after notice, the council might. He laid the pipe. In 1878 the said John P. Hutchinson became the owner of the premises in fee. The defendant Jacobus is lessee.

In the said American Hotel are eight water-closets, three urinals, two sinks, and three lavatories, all of which are connected by pipes with said drain, so that all the matter, liquid or solid, which is cast or deposited in those places is carried off and discharged into said Petty's run. The hotel is a large one. The ordinary daily occupants are about forty-five, and at times, for a day or two, and sometimes for a longer period, about one hundred and fifty. These all have access to and use the water-closets, urinals, and the like, to which are added all kitchen slops and water used in laundry work.

This stream passes near to the hotel property, but not adjoining. It also passes along and through a thickly-peopled portion of the city. Its natural bed was about eight feet wide, which is now narrowed by supposed improvements to two or three in places. In some places there is declivity enough to admit of a rapid flow of water, while in others the surface is so nearly level that the flow is very sluggish. This flow is hindered, too, by a rough and irregular bottom, composed of earth and of large and small stones or gravel. In a dry season it passes but little water, but is capable, by its formation, of retaining an immense amount of filth.

The board of health has adjudged that the depositing of all the matter which goes into the water-closets, urinals &c. in the hotel through the said drain, into the said Petty's run, is a nuisance and hazardous to the public health, of which it gave the defendants notice. To this notice the defendants gave no heed.

The board of health filed this bill, as they had a right to under the statute, and therein ask this court to restrain the defendants from the use of said pipe to discharge the matters above indicated into said run.

The defendants have answered. A large number of most intelligent and respectable witnesses have been examined.

Trenton Board of Health v. Hutchinson.

The defendants urge that the manner in which they use this stream to carry away the hotel filth is not a nuisance, and in no way hazardous to public health. In this respect, as the testimony stands, they are mistaken. The great, the decided, preponderance of testimony is against them. Whatever conclusions may be reached from isolated facts, when those facts are presented in a body they carry the mind at once to the conviction that the defendants are doing violence to their neighbors and fellow citizens.

It has been pressed upon my attention that many others are equally or more guilty. This I cannot consider. I allowed some testimony on this point, not because I thought it admissible, but that the defendants might be heard above, if I should be in error. I think each one is separately liable for the nuisance to which he contributes. It is no shelter to the one charged that another may have aided directly or remotely, or otherwise.

Again, counsel insist that this board of health has no authority to prosecute; that it has not shown itself to be within the statute. It is urged that, being a special tribunal, created for special purposes and clothed with definite powers, it must prove that it has walked according to the line prescribed in every particular, and that any departure is fatal to the entire work undertaken. This admits, however, and so the counsel frankly stated, the legal existence of the board of health in the city of Trenton.

But the power or right of this board to institute proceedings in this court is denied. It is denied that the board of health referred to in section 9 of the act of 1883 (*P. L. 1883 p. 122*) in any sense, includes the board of the city of Trenton. That section declares that any such board of health, instead of proceeding in a summary way to abate a nuisance, or such source of foulness, may file a bill in the court of chancery. It will be observed that it says any *such* board. If we follow the ordinary rule, we will look for the antecedent of "*such*." This we find in the section immediately preceding (the ninth). That section provides that whenever any board of health now organized, or which may be hereafter organized, under the laws of this state, as referred to in section 1 of this supplement to an act entitled "An

Trenton Board of Health v. Hutchinson.

act relating to local boards of health," approved March 22d, 1881, shall be notified that a nuisance or other source of foulness, hazardous to the public health, exists within the territory within which the board of health has jurisdiction or control, such board may examine the matter in a summary way, and order and cause the same to be abated. Now, when the words "such board may examine the matter in a summary way" are looked at in connection with the words "that any such board of health instead of proceeding in a summary way" &c. in the very next (tenth) section, which gives the authority to sue, it will be found, I think, beyond dispute, that the antecedent to the phrase *any such board*, in the latter section, is found in the one immediately preceding, in which and in which only is used the additional phrase "summary way."

Hence, of course, the inquiry: Does section 9 of the act of 1883 comprehend the board of health of the city of Trenton? I think, if it does not, it has no right to come into this court. Let us attend to the language of that section. It says, whenever any board of health *now* organized, or which may be hereafter organized, under the laws of this state, as referred to in section 1 of this supplement, being the act of March 22d, 1881. *P. L. p. 160.* It says as referred to in section 1 of this supplement, and section 1 refers to the act of March 11th, 1880, and to a supplement of March 31st, 1882, and also to the act of March 22d, 1881. So that, most evidently, the boards of health which may proceed in a summary way, mentioned in the ninth section of the act of 1883, are any and all such as are authorized by either of the acts above named.

Is the relator such a board? Again, let us attend to the language of the law. The first section of the act of 1880 (*P. L. p. 206*) reads:

"That any city or borough, or incorporated town, or any town governed by a commission, shall have a board of health of not less than five, or more than seven members, of which the keeper or recorder of vital statistics, and also one city physician and city health inspector, shall be members, if there be such officer or officers; and the said board of health shall be nominated by the mayor and approved by the common council, or other governing body of

Trenton Board of Health v. Hutchinson.

the city, borough or town, to serve for not less than three years, but not more than three of the number shall go out of office at any one time."

This section declares that every city shall have a board of health. But it is said that such board does not come within the purview of the section last recited. The claim is that this board is the creature of the common council of the city, and that it has not and cannot have any other paternity. It is said that the council solemnly and formally organized and established it. It is true that July 11th, 1882, the council did, in the name of the inhabitants of the city of Trenton, ordain that there should be a board of health established in the city of Trenton, and that the same should be organized in accordance with the provisions of an act entitled "An act concerning the protection of the public health, and the record of vital facts and statistics relating thereto," approved March 11th, 1880, and the supplements thereto. From this it would appear that the council only intended to bring the case within the act referred to and its supplements. This ordinance required the mayor to nominate men as members of the board of health, and to send such nominations to the council for its approval. The first section of the act of 1880 requires the mayor to nominate members of such board, and the council to approve of such nominations. The mayor made such nominations and the common council approved of them. All this purports, on its face, to have been done by virtue of the authority conferred by the act last cited.

In my judgment the law was substantially complied with. The statute says that said board of health shall be nominated by the mayor and approved by the common council. It did not require any ordinance. No preliminary steps are demanded by the statute. The first movement contemplated is the nominations by the mayor; and the second, the approval by the common council, both of which were taken effectually in this instance. Nothing else that was done could add to or detract from either the nominations or approval.

But now the nominations being made, and the approval given, it is urged that the prescribed statutory line has been departed from in the nominations of the health inspector and the physi-

Trenton Board of Health v. Hutchinson.

cian. The statute declares that one of the city physicians and the city health inspector shall be nominated as members of the board. Therefore the mayor had no choice. To this extent the legislature made the selection. It is said one of the members must be one of the city physicians, and one the health inspector. And this brings us to what is regarded as the fatally weak spot in this branch of the complainant's case; that is, that, although the health inspector and one of the city physicians were appointed, their appointment was a nullity in this case, *because the period of time for which each of them held such office, or could hold such office under the city charter, was only one year, while the first section of the act directing the appointment, expressly says that said board shall be nominated "to serve for not less than three years."* Shall a beneficent public work, set on foot by the representatives of the people, fail in its mission because of this seeming irregularity? I feel myself bound to construe the act favorably to the relator. The public are deeply interested; this is made most conspicuous by the title of the act, and every line which follows. I must regard the object to be attained, or had in view by the legislature, viz., the preservation of the public health. *Sedg. on Stat. Const. 193.* In matters between individuals arising under the statute of frauds, it has been repeatedly adjudged that the act should receive a liberal construction. "It should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy." *Potter's Dwar. on Stat. 73, 231*, approved by our court of errors, in *Randolph v. Larned, 12 C. E. Gr. 557, 560.*

And there are, I think, some authorities which bring the view as to liberal construction where third persons or the public are concerned, still nearer in relation to this case. I refer to *Perth Amboy ads. Smith, 4 Harr. 52, 56, 57.* In that case an overseer of the poor had neglected to take the oath of office, but acted as such officer. The court held that he was overseer *de facto*. Hornblower, C. J., declared that such was the law, "in those cases where the public good imperatively requires an act to be done without delay, and where individuals have rights *ex debito justitiæ* against the public or other individuals which would fail

Trenton Board of Health v. Hutchinson.

for want of a public functionary to act in the premises." *Hoagland v. Culvert*, *Spen.* 387; *State v. Perkins*, 4 *Zab.* 409. In this case, the members of the common council who had not been legally sworn as such, imposed a tax, the collection of which was resisted on that ground; but the court said "that the acts of officers *de facto* in which other parties or the public have an interest, are valid." *State v. Tolan*, 4 *Vr.* 195, 201; *People v. White*, 24 *Wend.* 520, 525. "A clerk of the court appointed by a judge *de facto*, is well appointed, and may hold his office, though the judge be ousted." *People v. Staton*, 73 *N. C.* 546; See, further, *Savage, Receiver, v. Ball*, 2 *C. E. Gr.* 142; *Ang. & A. on Corp.* § 287, and 7 *Bac. Abr. tit. "Offices"* 283.

Believing that the object of the legislature was to achieve some public good, and it being undisputed that the officers named were nominated and approved, and that they have acted as members of the board of health, with the numerous cases above cited and referred to before me, there seems to be nothing left for me to do but to regard the objection to the relator's right to sue, because the city physician and health inspector had not, under the city charter, terms of office of three years' duration, as untenable. If this objection were to prevail, it would only be by chance that any city could claim the advantages of the act. Every city must not only have the power to appoint such officers for three years, but they must actually make the appointment contemporaneous with the appointment of the board of health; for the loss of a day or a week would as effectually bar as two years. If time be the important principle, its extent or duration must be wholly immaterial.

I conclude, therefore, the relator is such a body as is contemplated in the ninth and tenth sections of the act of 1883.

The counsel of defendants think the proceedings should fail, because the act of 1881 is unconstitutional. In my opinion, the arguments adduced do not reach this case.

The last point which claims attention is that of the protection which the defendants seek, under the license, to lay this drain-pipe, and to discharge the deposits in their urinals, water-closets &c. through such pipe into Petty's run. It is urged that such

Trenton Board of Health v. Hutchinson.

license is in the nature of a contract, and irrevocable. This view does not commend itself to my judgment. I think that such a doctrine, were it to prevail, would be fraught with incalculable mischief, and would defeat all efforts towards the preservation of the public health. But is it possible that the ordinance itself, behind which defence is made, is of any validity? Can the common council authorize one man to discharge all the worst of filth which accumulates on his own premises upon his neighbor, or to deposit it under his door or window? Can it be possible that any legislature ever granted such extraordinary, hostile and destructive powers? Can it be possible that any court has adjudged that such license or such law was or is within the power of either council or legislature? Is it possible that one individual can thus acquire rights so vast against the rights of his neighbors in their property and in their health? I do not and cannot think so.

But whatever may have been the power of the common council of the city of Trenton, and whatever *privileges*, not *rights*, Bartlett acquired under the license, the legislature, in its wisdom, has enacted that whenever the board of health shall be notified that a nuisance or other source of foulness, hazardous to the public health, exists, such board may examine the same in a summary way and order or cause the same to be abated. The legislature has also enacted that any such board of health, instead of proceeding in a summary way to abate a nuisance or such source of foulness, may file a bill in the name of the state, on the relation of such board of health, for an injunction to prohibit the continuance of such nuisance or such source of foulness. This is without exception or qualification. This does not say "unless licensed." It comprehends every nuisance or source of foulness hazardous to the public health.

I think the relator was justified in filing the bill. I think the discharge of the water-closets and the like of the defendants into Petty's run, through the pipe named and described in the bill, is a nuisance and hazardous to the public health, and should be abated. I will so advise. The defendants ought to pay costs.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1884

THEODORE RUNYON, Esq., ORDINARY.

In the matter of the account of JACOB DISSENGER, guardian of
Mary Dissenger, a minor.

A guardian received pension-money quarter-yearly for nine years on account of his ward. He never filed any account from the time of his appointment, fifteen years ago, until cited.—*Held*, that although there was no evidence that he had used the money, he must pay interest on the pension-money, with annual rests; that he was not entitled to commissions, nor to any allowance for the maintenance of the ward (whose mother he married when the ward was four years old) while the ward continued to live in his family and until the mother's death, but that he should be allowed for board paid to third persons thereafter.

On exceptions to final account of guardian.

Mr. W. P. Wilson, for the exceptant.

Mr. D. C. Allinson, for the guardian.

Dissenger's Case.

THE ORDINARY.

The debit side of the account contains but one item—\$959.93 $\frac{1}{3}$, pension-money collected by the guardian for the ward. The credit side is made up of expenses paid in collecting the pension, a charge for board and clothing of the ward, and the guardian's commissions. The grounds of exception are that the guardian does not give the date of the receipt of the pension-money; that he does not account for interest thereon, and that the charge for board and clothing of the ward should not be allowed. It appears, by the evidence, that the ward was the step-child of the guardian, who married her mother in the fall of 1866, when the ward was but about four and a half years old. She lived with him in his family in Trenton until the death of her mother, which occurred in the fall of 1868. Almost, if not quite, immediately after her mother's death, he placed her in the family of his married daughter, Mrs. Carl, in Philadelphia, where she remained, according to the evidence, for forty weeks, he paying \$2.50 a week for her board. On the 6th of July, 1869, she was admitted as an inmate of the soldiers' children's home in Trenton, and from that time he was at no expense for her support.

He was appointed guardian January 25th, 1869, and received the pension-money in quarter-yearly payments from 1869 to 1878, both inclusive. When he began to receive it, his wife, the ward's mother, was dead, and he was paying board for the ward to Mrs. Carl. He appears, from the statements made by his counsel, to have received \$84 in 1869, \$72 in each of the years 1870 and 1871, \$98.40 in 1872, and \$120 in each of the years from 1873 to 1877, both inclusive, and \$34.33 $\frac{1}{3}$ in 1878—\$960.73 $\frac{1}{3}$ altogether. Though he was examined as a witness at much length, it does not appear what he did with the money. The question was not asked. But although it does not appear whether he used the money or not, nor that he has had any business in which to use it, he is, under the circumstances, accountable for interest. It must be presumed that he used the money for his own purposes. As before stated, it was paid to him in quarter-yearly payments. He in no year received more than \$120, and in each of two of the years he received only \$72.

Dissenger's Case.

It will be reasonable, under the circumstances, to require him to account for interest upon the money received in each year from the time of the last payment in that year, with annual rests. The amount with which he charges himself is \$959.93 $\frac{1}{2}$. It should be \$960.73 $\frac{1}{2}$. The account should be further corrected by stating therein the time and amount of each receipt of the pension-money.

The guardian charges \$522 for board and clothing of the ward from October 10th, 1866, to August 10th, 1869, two years, ten months and ten days, at \$3.50 per week. Although he says he always intended to charge the ward for board, there should be no allowance either for board or clothing while she was a member of his family—that is, up to the time of her mother's death. He, while she lived with him, appears to have voluntarily undertaken to care for and support her. When he married her mother the ward was but about four and a half years old, and he took the child and supported her as a member of his family. She had no property. He stood *in loco parentis* to her while she lived with him, and in the absence of any promise by her, since attaining her majority, to pay him for such support, he cannot recover it. *Haggerty v. McCanna*, 10 C. E. Gr. 48. But he is entitled to be repaid the money he paid to Mrs. Carl for her board. The relation between them had been changed when he put her to board with Mrs. Carl. His wife, the child's mother, was dead, and the child had ceased to live in his family. On the death of her mother she became entitled to a pension for her support. He should be allowed \$100 for forty weeks' board at \$2.50 a week, paid Mrs. Carl, with legal interest thereon (seven per cent. per annum to July 4th, 1878, and six per cent. per annum thereafter) from July 6th, 1869. He should have no commissions. He received the last of the money in 1878, and he never accounted until cited in December, 1883, and then nearly fifteen years had elapsed since his appointment as guardian. The exceptions are sustained, with costs to be paid by him out of his own estate. He must also pay a counsel fee of \$50 out of his own funds to the exceptant's counsel.

Mount v. Slack.

GEORGE W. MOUNT, administrator, appellant,

v.

CLARENCE M. SLACK, administrator, respondent.

1. The time within which an appeal from the orphans court is to be taken, is computed not from the delivering of the court's opinion, but from the signing, filing or entering of the order or decree in the minutes of the court.

2. After the account of two administrators, allowing commissions in a gross sum to both, had been passed, one of them, alleging that his co-administrator had possessed himself of all of the commissions, filed a petition in the orphans court to compel his co-administrator to pay him one-half thereof—*Held*, that the orphans court had no jurisdiction to grant the order.

Appeal from order of Middlesex orphans court.

NOTE.—Where there are several executors or administrators, they are entitled jointly to no more for their services than what would be an adequate compensation to one, *Phillips v. Richardson*, 4 J. J. Marsh. 212, 214; *Savage v. Sherman*, 24 Hun 307; *Walker's Estate*, 9 Serg. & R. 223; *Valentine v. Valentine*, 2 Barb. Ch. 430.

Where there are two executors, and the will fixes the commission of one, the court can only allow one-half the maximum rate to the other, *Lee v. Lee*, 6 Gill & J. 316; *Edwards's Succession*, 34 La. Ann. 216; *Secor v. Sentis*, 5 Redf. 570; *Oden v. Windley*, 2 Jones Eq. 440; *Guien's Estate*, 1 Ashm. (Pa.) 317.

Where an executor, qualified and offered to act eighteen years after the testator's death, but the other two executors, who had duly qualified, retained the estate—*Held*, that he was not entitled to commissions, *Walke v. Hitchcock*, 5 Redf. 217.

In *Lemmon v. Hall*, 20 Md. 168, the allowance of the maximum commission fixed by statute, to an administrator, was held not to deprive an administratrix *de bonis non* after his death of full commissions on the balance remaining in the administrator's hands.

In *Schoeneich v. Reed*, 8 Mo. App. 356, 363, an executrix made no claim for commissions, and it was held that her co-executor was entitled to the full amount.

Ordinarily, commissions should be equally divided, where there are several executors, *Squier v. Squier*, 3 Stew. Eq. 627; *Bohde v. Bruner*, 2 Redf. 333; *Van Nest's Estate*, 1 Tuck. 130; *Seitz's Case*, 6 Mo. App. 250; but, where one has performed more than his share of the work, the court may allow him a proportionate share of the commissions, *Smart v. Fisher*, 7 Mo. 580; *Grant v.*

Mount v. Slack.

Mr. G. O. Vanderbilt, for appellant.

Mr. C. T. Cowenhoven, for respondent.

THE ORDINARY.

The decision upon which the order appealed from was entered, was pronounced on the 15th of February, 1884, but the order was not signed until the 29th of May following. The appeal was taken on the 9th of July. The respondent insists that it was not taken within the time limited by law; that the three months began to run from the time when the decision was announced, and not from the date of the order. It has been repeatedly held that the time within which an appeal is to be taken is to be computed, not from the time when the decision was announced, but from the time when the order or decree was signed and filed,

Pride, 1 Dev. Eq. 269; *Hodge v. Hawkins*, 1 Dev. & B. Eq. 564; *Walker's Estate*, 9 Serg. & R. 223; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Huggins v. Rider*, 77 Ill. 360; *Hill v. Nelson*, 1 Dem. (N. Y.) 357; but see *Richardson v. Stansbury*, 4 Harr. & J. 275.

On the death of one of two executors, both of whom had undertaken the trust, the survivor was held not entitled to commissions on that part of the estate in his deceased co-executor's hands, *Perry v. Maxwell*, 2 Dev. Eq. 488.

If all the commissions are allowed to one of two executors, the legatees cannot object, *Claycomb v. Claycomb*, 10 Gratt. 589; *Stephenson v. Phillips*, 1 Zab. 70.

An agreement between two executors that one should receive two-fifths of the commissions charged by the other, who settles a separate account, is not illegal, if it appear that the former has transacted part of the business of the estate, *Aston's Estate*, 5 Whart. 228; *Brown v. Stewart*, 4 Md. Ch. 368.

Where an administrator &c. resigns, the amount of his commissions must be equitably adjusted by the court, relative to the amount of his services, and what still remains to be done, *Ord v. Little*, 3 Cal. 287; *Marvin's Case*, *Myrick* (Cal.) 163; *Day's Case*, 3 La. Ann. 624; *Cherry v. Jarratt*, 25 Miss. 221; but see *Jones's Case*, 4 Sandf. Ch. 615; *Moffatt's Case*, 24 Hun 327; or where he dies, *Milne's Succession*, 1 Rob. (La.) 401; *McPherson v. Agnew*, 5 Gill & J. 60; *Parker v. Gwynn*, 4 Md. 423; *Selby v. Selby*, 1 Bland 149, note; *Effinger v. Richards*, 35 Miss. 540; *Perry v. Maxwell*, 2 Dev. Eq. 488, 507; *Corbin v. Howell*, Bail. Eq. 183; *Turner v. Turner*, 1 Gratt. 11; *Lay v. Lay*, 10 S. C. 208; but where a guardian dies, his administrator is not entitled to commissions for paying over the ward's funds to the new guardian, *Floyd v. Priester*, 8 Rich. Eq. 248; see *Adams v. Latham*, 14 Rich. Eq. 304; nor are surviving executors entitled to

 Mount v. Slack.

or entered in the minutes of the court. *Hillyer v. Schenck*, 2 *McCart*. 398; *Young v. Young*, 5 *Stew. Eq.* 275; *Mount v. Van Ness*, 7 *Stew. Eq.* 523. The appeal in this case was therefore taken in due time.

The order appealed from is one dismissing the petition of the appellant, as one of the two administrators of the estate of Enoch Mount, deceased, for an order of the orphans court requiring his co-administrator, the respondent, to show cause why he should not pay to the appellant one-half of the commissions allowed to them upon the passing of their joint account as such administrators. The petition, it may be observed, did not pray for an order requiring the respondent to pay, but to show cause why he should not pay. It was treated, however, as an application for an order requiring him to pay half of the commissions to the appellant. The court granted the order to show cause, and

commissions on a sum paid to the representative of a deceased co-executrix for arrears of commissions due her, *Betts v. Betts*, 4 *Abb. N. C.* 324, 438; nor the administrator of a deceased executor paying over the moneys of the testator in the intestate's hands to a surviving executor, *Griffin v. Bonham*, 9 *Rich. Eq.* 71; or, where the administrator &c. is removed, *Spratt v. Baldwin*, 33 *Miss.* 581, 34 *Miss.* 327; *Barton's Estate*, 55 *Cal.* 87; *Fournier v. Ingraham*, 7 *Watts & S.* 27; see *Rice's Succession*, 14 *La. Ann.* 317; *Foley v. Egan*, 13 *Abb. Pr. (N. S.)* 361, note; or, where, having partly administered, he removed from the jurisdiction of the court, *Berry's Case*, 1 *Bland* 149, note; or, where a sale of lands made by him had been set aside, without any blame having been imputed to him, and afterwards his successor sold the same property, *Lawson v. State*, 1 *Bland* 149, note.

The orphans court has no power in Pennsylvania to apportion the commissions, where there are conflicting claims by different executors as to the amount due each one, *Davis's Estate*, 1 *Phil.* 360; see *Wickersham's Appeal*, 64 *Pa. St.* 67; *Stevenson's Estate*, *Pars. Eq.* 18; aliter, in Alabama, *Carver v. Hallett*, 26 *Ala.* 722.

An action at law will not lie by one executor against another, after an order of the orphans court has fixed the amount due to the plaintiff, *Carver v. Hallett*, 26 *Ala.* 722; *Hope v. Jones*, 24 *Cal.* 89; nor, before such order apportioning the commissions, *White v. Bullock*, 4 *Abb. App. Dec.* 578, reversing 20 *Barb.* 91.

An action of debt to recover one-half the commissions was held to lie by one administrator against another, who had received them all, *Bush v. McComb*, 2 *Houst.* 546; or, *assumpsit*, *Richardson v. Stansbury*, 4 *Harr. & J.* 275; or, a bill in equity, *Walton v. Erwin*, 1 *Ired. Eq.* 136.—REP.

Mount v. Slack.

on hearing it dismissed it and the petition on the ground of want of jurisdiction. The application was based on the one hundred and twelfth section of the orphans court act (*Rev. p. 776*), which provides that where any difference arises between executors, administrators, guardians or trustees in regard to the proportion of commissions between them, the orphans court shall determine the same, having regard to their respective services. No difference arose on the passing of the account as to the proportion of commissions which each administrator should receive, but the commissions were allowed (so far as appears, without objection) in a gross sum to both. The application under consideration was an attempt by the appellant to compel his co-administrator to pay him his share of them. The petition alleged that the latter had possessed himself of the whole amount, and refused to pay the petitioner his share. The above-quoted section of the act confers no jurisdiction upon the orphans court to compel payment by one administrator to another of his share of the commissions allowed in gross to both. It is obvious that the section referred to gives the court no jurisdiction over such a suit. The differences to which it relates are only such as arise in regard to the proportion of the commissions to which each of several executors, administrators, guardians or trustees may be entitled in respect of his services, and are to be adjusted by the adjudication of the court on the passing of the account. The proceeding under review was not in form, nor was it in effect, an application to open the account for fraud or mistake in regard to the commissions. Neither fraud nor mistake was alleged. Nor was it an application to review in any way on any ground the decision of the court as to the commissions. No complaint was made of its award in that respect. There is no error in the order appealed from. It will be affirmed, with costs.

Black v. Foljambe.

EDWARD S. BLACK et al., appellants,

v.

HENRY FOLJAMBE, respondent.

1. The testimony in the case was held to establish, clearly, the capacity of the testator to make a will.

2. That a wife requests her husband to appoint her one of the executors of his will, is not evidence of fraud or undue influence; nor the fact that the wife's sisters, one of whom testator was visiting, procured the attendance of the lawyer of one of them to assist testator's lawyer in drawing the disputed will.

Appeal from decree of Morris orphans court.

Mr. J. B. Vreeland and *Mr. H. C. Pitney*, for appellants.

Mr. W. G. Cumming, for respondent.

THE ORDINARY.

This appeal brings up for review a decree of the orphans court of Morris county, refusing to admit to probate a writing purporting to be the last will and testament of George Brown, deceased. The will was executed on January 8th, 1883, at the house of Mrs. Noe, a widow, and sister of the testator's wife, in Madison, in the county of Morris, at which house the testator then lay sick. It was drawn and signed on Monday, and he died on the following Wednesday. He was about seventy or seventy-one years old, and had been sick for a considerable length of time. He had made a will, drawn for him by Edward S. Black, Esq., a counselor-at-law of Newark, in June, 1882. In November following, he gave directions to Mr. Black for a codicil to it, revoking the legacies therein given to Lizzie Whitfield and Robert L. Whitfield. Though the codicil was drawn, it was not executed. The will in question was drawn by Charles A. Muir, Esq., a lawyer practicing in Morristown, aided by Mr. Black. It is very simple. It directs that

Black v. Foljambe.

the testator's debts and funeral expenses be paid, and then gives to the testator's wife all his property, both real and personal, wheresoever situated, and whatever the same may be, to her and her heirs and assigns forever, and adds that it is the testator's will that none of his real estate shall be sold until five years shall have elapsed from the date of his decease. It then appoints Mr. Black and the testator's wife executors, and then gives to Lizzie Jones, the testator's adopted daughter, \$10. The caveator insists that the testator was incompetent to make a will when that will was made, and that the will was the result of undue influence on the part of his wife and her family. The testator was a man of intelligence and firm character. He was, by profession, a Methodist preacher, but in the latter part of his life he was engaged in the business of fire insurance. He was president of the Humboldt Insurance Company of Newark. He had no children, nor any descendants. He was married twice. His marriage to his last wife took place in 1878. He was then sixty-five or sixty-six years old, and she twenty-two. By the before-mentioned will of June, 1882, drawn by Mr. Black, he provided for her by giving to her all his household furniture, books, pictures, works of art, fuel, housekeeping provisions and other consumable stores in or about his dwelling-house in Newark, and then placed the residue of his property in the hands of his executors, in trust, for twenty years from his death, giving to George B. Whitfield, out of the income, \$50 a year until his majority, and to the testator's wife, \$300 a year until the end of the twenty years, if she should live so long, and directed that the balance of the income be used in paying off encumbrances on the property. And he provided that if his wife should be alive at the end of the twenty years, the principal, after paying out of it \$1,500 given in legacies to George B., Lizzie and Robert L. Whitfield, if they should be alive, should go to her. The will provided also that in case Mrs. Brown should refuse to accept the provision therein made for her, his household furniture, books, pictures and works of art should be converted, as soon as practicable after his death, into cash, and that the \$300 a year given by the will to her (on condition of accepting the provision)

Black v. Foljambe.

be used to pay off the encumbrances of his real property, and that at the end of the twenty years, the real and personal property be converted into cash, and after paying the legacies to the Whitfields, if alive, the balance go to certain charitable associations. It appears that in the latter part of November, 1882, he, as before stated, gave directions to Mr. Black to draw a codicil to that will, revoking the gifts therein to Lizzie and Robert L. Whitfield. He represented to Mr. Black (according to the recollection of the latter) that Lizzie Whitfield was dead, and Robert L. Whitfield insane. In fact, Lizzie was not dead, and Robert was not insane. Lizzie's husband was insane. The testator had made a will previously to that just mentioned, in which he had made like provision for his wife.

The will in question was executed with all due legal formalities, and the testator appears to have been possessed of the requisite mental capacity. I do not regard the fact that in September or October, 1882, he signed his wife's name with his own to a deed for a piece of property he owned in East Newark, as an evidence of insanity. The property was not of very great value. The consideration of the conveyance was \$600. The testator was in Newark, and his wife, at the time, in Madison. He gave as his reason for signing her name that she would be willing to sign the deed and he did not want to trouble her about the matter. She did, in fact, sign the deed afterwards, without any objection whatever.

It is urged that when he directed Mr. Black to draw the codicil he was under a delusion as to Lizzie and Robert L. Whitfield. As before stated, the husband of the former was insane and she was alive, and Robert was not insane. Mr. Black says the reason given for revoking the legacies, according to his recollection, was that Lizzie Whitfield was dead and Robert L. Whitfield insane. But the reason for the change was a matter of no concern to him. To him the important part of Mr. Brown's communication was the direction to revoke. Mr. Black was not interested in the reason, and his recollection may be at fault in reference to it.

The proof is that, when the will in suit was made, the testa-

Black v. Foljambe.

tor's mind was unimpaired. He transacted business almost up to the day of his death. Mr. Williams, who was his partner in business, testifies that the testator settled his affairs with the Humboldt Insurance Company about the 1st of December, 1882, which was only about a month before his death, and that he received letters from the testator during his last sickness, the last one only about four days before his death. It was written by his wife but dictated by him. At the same time the testator sent two checks drawn on the bank in which he kept his account, one for the amount of his indebtedness to an individual, and the other for what he owed to an insurance company. They were correctly drawn, on the right bank, for the right amount, and to the right persons. Other witnesses testify to his competency. Dr. Van Wagner, who attended him in his last days, from about the 16th of November to the time of his death, says his mind was always perfectly clear; that he considered him a man of strong will and great self-possession; that he saw him on Sunday night (the night of the day before that on which the will was executed); that they two were alone at the time, he thinks; that the testator said but very little; that the testator asked him how he thought he was; that he told the testator he was very weak; that the testator said if he, the doctor, thought he was going to pass away he would like to know it, and he, the doctor, told the testator that he thought there was no immediate danger, and that the testator said he had some business to arrange—something to that effect; that he saw him again on Monday night (after the will had been executed), and he seemed rather more cheerful; that the testator was perfectly composed on the next day, Tuesday, and that he, the doctor, told him he thought he probably would not live long. He says, also, that on Sunday and Monday the testator's mind was clear. Mr. Williams, the witness before mentioned, says of the testator that mentally he was "very firm, rather headstrong, a man very much set in his way." Dr. Osborne, who had known him for a long time and had been his family physician for many years, attended him in the summer of 1882. His last call upon him was on the last day of June in that year. He says the testator was a very quiet,

Black v. Foljambe.

still, persistent man—very persistent, rather hard to move, and that his mind was very clear indeed. Mrs. Brown, it may be added, says he was very firm, a man of very strong will, and that she never saw any indication of failure of his mental powers. More than all this, we have the evidence of the condition of his mind at the very time of executing the will in dispute. Mrs. Noe testifies that he gave her instructions for the will; that he called her to his bedside and said: “I will tell you what I want done. I am going to make a new will,” and added, “I will leave everything to Emma [his wife], but I don’t want the property squandered; it must not be sold under ten years, as the value of the property will increase.” Mr. Black says the testator first mentioned the subject of the will to him; told him he had sent for him with reference to redrawing his will; that he wanted him to draw it, and had sent for him for the purpose; that he wanted another will and wanted to leave everything to his wife, with provision that the estate should not be sold under five years, and that his wife and Mr. Black should be the executors. Mr. Black told him he would see to it that the will should be drawn in compliance with his wishes. Before the will was signed, Mr. Black read it over to him slowly and carefully, clause by clause, and after he had done so asked him whether it was in compliance with his wishes or not, and he said it was. The testator took the paper which was handed to him for the purpose, and read it over himself, and after he had read it handed it back to Mr. Black and then it was signed. He told Mr. Black that he was anxious to have the will so drawn that it could not be set aside, and he asked Mr. Black if there would be any chance of setting it aside. Mr. Black told him that any will could be contested, but that there was a difference between a mere contest and a successful one. After the will had been signed and the execution of it witnessed, Mr. Black took the old will out of his pocket and said, “I suppose you want this will destroyed now?” to which the testator replied Yes, and took the old will and tore it. Mr. Muir, the lawyer who drew the will, and who was one of the witnesses to its execution, testifies as follows:

Black v. Foljambe.

"Mr. Black had the will; after drawing the will I handed it to him; he took it to the room with him; we went into the room and there was some little general conversation, and then Mr. Brown spoke something about the will, and asked if it was done; I told him—Mr. Black, I think, told him—that he had the will, and Mr. Brown said he would like to hear the will read; so Mr. Black read the will to him; at the conclusion of it Mr. Brown said; 'Now, does it take so much paper as that to give everything to my wife?'—something of that nature; Mr. Black told him that if he would notice I had written very loosely; that is, I write with such a large hand; Mr. Brown said that he wanted his will drawn so that everything would be left to his wife and wanted to read the will himself; Mr. Black handed him the will and he looked at it and read it over very carefully, and said he guessed that was all right."

There is no room to question the testator's capacity.

Nor does the evidence establish fraud. There is no proof of any importunity on any subject except for the appointment of Mrs. Brown as executrix. She was desirous that that change should be made. The testator had excused himself for not having appointed her in the will of June, 1882, on the ground that his business with the Humboldt company was not settled (as in fact it was not) at that time, and that therefore, in view of that matter, it seemed to him best for her that he should appoint business men alone as executors. But that business had been settled, and she wanted to be appointed executrix and told him so. He promised to do it and kept his word. The will was a natural one. He was kindly nursed by his wife. Dr. Van Wagner says he had good, careful nursing, and that his wife appeared to attend to him. There is no evidence of any but the kindest treatment of him at Mrs. Noe's house. He had no relatives nearer than sister's children. The Whitfields were related to him by marriage (the first one) only. He was affectionate towards his wife. He had shown a disposition to give her the benefit of his estate, which was not very large (it is valued at \$20,000), and it appears from Mr. Black's testimony that the reason why he placed it in trust for twenty years by the will of June, 1882, was that he desired, for her protection, to secure it to her against her father. In none of his wills did he mention any of his relatives. To the Whitfields he made bequests by the will of June, and perhaps by the preceding one, but in November he intended and had determined to revoke the legacies to

Black v. Foljambe.

two of them, Lizzie and Robert. It is not surprising to find that he had concluded, after a month's sickness, in which he had received the kind care and attention of his wife, to give all the property to her alone. The will is substantially in accordance with his former testamentary dispositions of his estate. There was therefore no reason for fraudulent imposition upon him to obtain it. In no will did he ever, so far as appears, give anything to the respondent, or any other of his collateral relations, in any way or in any contingency. Between him and the respondent there appears to have been no intercourse for years before his death.

It is insisted, however, that there is evidence of artifice and fraud in the steps taken to procure the will. The principal and material facts on this head appear to be that Mrs. Noe, who owned a farm about two miles from Madison, lived with her children in a house near it belonging to her father, Ezra Ayres, and he lived with her and looked after her farming operations for her. He also carried on business as a grocer and dealer in provisions in a house in Elm street, Newark, owned by him, and in which his wife with their other children lived. He was in the habit of going down to that place about once a week. On Sunday, the day before the will in question was drawn, the testator asked his wife if her father was going to Newark the next day. She answered Yes. He then said, "Then I will send for my will by him and get Mr. Black to come up." She then, at his request, wrote a note to Mr. Black and signed it, by his direction, with his name. That note was dated the 7th of January (Sunday), and was as follows :

"My health is so feeble that I shall not be able to come to the office at present, and perhaps never. You will please come up to Madison with Mr. Ayres, and bring with you my last will and testament."

The testator on the same day told Mr. Ayres that he wanted him to go to Newark on Monday morning and see Mr. Black, and get him to come up to Madison and bring the will. Mr. Ayres took the note on Monday morning, went to Newark and called on Mr. Black at his office. The latter agreed to go to

Black v. Foljambe.

Madison with him. Mr. Ayres then went to his house in Elm street, and there informed his family that the testator was worse and on what errand he, Ayres, had come down. One of his daughters suggested that a telegram be sent to Mr. Muir, requesting him to be at Mrs. Noe's at the time Mr. Ayres and Mr. Black would reach there—at noon—to attend to the drawing of the will. Mr. Ayres thought it would be of no use to send the dispatch, but his daughter, nevertheless, sent it from Newark in the name of Mrs. Brown. Messrs. Black and Muir reached Mrs. Noe's house at about the same time—within a few minutes of each other. Mrs. Noe received, as she swears, instructions from the testator as to what the will should be. She wrote them down on a piece of paper and handed them to Mr. Muir. At the same time she showed to Messrs. Black and Muir, and handed to the latter, a draft of a will drawn by the testator antecedently to the will of June, 1882, but not signed, in which he gave all his property to his wife absolutely and at once. Mr. Black afterwards went to the testator's room and saw him, and received from him the same instructions which Mrs. Noe had received, except that the testator told him, he says, that he desired that he real estate should not be sold in less than five years from his death. She says he named ten years in his instructions to her. Mrs. Brown asked the testator, after he had given his instructions for the will, whether he was not going to leave Lizzie Brown (Jones), an adopted daughter of his (but apparently not dependent on him) anything, and he said "Put her in for ten dollars, or a small amount, just so she will not make any trouble." Although the will was drawn by Mr. Muir, Mr. Black superintended it, and when it was finished dictated from a form-book to Mr. Muir the attestation clause. When the will was taken to the testator's room to be signed, Mr. Black took it out of Mr. Muir's hands at the door and read it to the testator, and superintended the signing. When the will was signed Mr. Ayres and his wife (who had come up from Newark with him) were present, as also were Mrs. Noe and Mrs. Brown. It is argued that the facts above recited show fraudulent contrivance, and lead to the conclusion that the will was the result of undue influence over

Black v. Foljambe.

the testator. In the consideration of the question whether the will is fraudulent or not, the fact that the disposition made by the testator of his property by this will was in favor of the same person to whom by his former wills he had given by far the larger interest in his estate, is of very great importance. By the will of June, 1882, his wife was the principal beneficiary. He gave, indeed, to George Brown Whitfield \$50 a year out of the income until he should have attained his majority, and directed that at the end of the twenty years, George, Robert L. and Lizzie Whitfield should each, if living, have \$500 out of the estate. But in November he had determined to revoke the gift to two of them; and, had he executed the codicil, George B. Whitfield and Mrs. Brown would have been the sole primary beneficiaries under the will. That the testator had determined to change his disposition of his estate is evident from what he said to Mr. Black on the day the will under consideration was drawn. When, in giving his testimony, Mr. Black was requested to give the words of the conversation between him and the testator on that occasion, he said:

“We had a talk first about his being so low; I expressed my sorrow at seeing him so feeble; he said he was pretty feeble, or something of that kind, and he then told me about wanting to have a new will drawn—that he wanted to have things different, and he told me how he wanted it; he said he wanted everything left to his wife, and that he wanted myself and his wife appointed executors.”

Mrs. Brown swears that the testator always told her he had left her everything. In fact, the evidence shows that she was in no way dissatisfied with his disposition of his estate, or with his existing will, except that she desired to be executrix. This desire seems to have been attributable to the fact that there had been some trouble between Mrs. Noe and the executor of her husband's will, and to avoid a like difficulty, Mrs. Brown wanted to be an executor of her husband's will. There was, previous to the will of June, a will to which Mr. Black testifies, which was equally favorable to Mrs. Brown with the latter.

There are some important facts in this transaction which are indisputable. The testator was desirous of altering his disposi-

Black v. Foljambe.

tion of his property. Dr. Van Wagner says, as before stated, that on Sunday the testator asked him to let him know whether he thought he was likely to die soon. The reason appears to have been that he had some business to arrange. It is not shown that he had any business to do, except to make his will, and that, probably, was the business to which he referred. The testator sent for Mr. Black to come to him on Monday, and bring his will with him. He told Mr. Black that he had sent for him, and for that purpose. Mrs. Brown wrote a note to Mr. Black, as she says she did. The testator communicated to Mr. Black the fact that he wanted to make a new will, and "to have things different" from what they were in the then existing will, and he told him what he wanted, viz., to give his wife all his property, and to appoint Mr. Black and her, executors. He knew Mr. Muir was in the house, and what his business there was. He knew from Mr. Black that Mr. Muir was drawing the will. The testator was anxious that the will should be so drawn and executed that it could not be successfully contested. After the will was read over to him, he requested that it be handed to him, in order that he might, himself, read it. It was done, and he read it over himself, and said he guessed it was all right. It does not appear that Lizzie Jones was mentioned in any previous will, and it does not appear that she had any claim whatever on the testator, or to his bounty.

The fact that Mrs. Brown's family were desirous that Mr. Muir should draw the will, and took measures to bring him to the house for that purpose, is of no great weight under the circumstances. This conduct on their part may have been due to meddlesome officiousness merely, or to a desire to have the will drawn by a lawyer whom they knew, so that they would be sure it would be done properly. They brought the testator's lawyer to the house with the will, which was in his possession, to attend to the business as the testator requested, and he, in fact, did so. The will that was drawn was in accordance with the testator's wishes and intentions towards his wife, as previously expressed.

It is urged that the difference between the will of June and the will in question is not only very notable, but evidence of

Byard v. Conover.

undue influence. The former will tied up the residue of the estate in trust for twenty years, giving to George B. Whitfield an annuity of \$50 until his majority, and Mrs. Brown one of \$300 to the end of the twenty years, and then gave \$1,500 to the Whitfields, if living, and the rest to Mrs. Brown, if living, with limitation over to charities. As before stated, the testator, in November, determined to revoke the gifts to Robert L. and Lizzie Whitfield, so that the difference between his intention in November, and his intention in January following, was to the disadvantage of George B. Whitfield and the charitable associations. It is not at all improbable that, during his sickness at Mrs. Noe's house, the testator concluded that he ought to give all his property to his wife, to the exclusion of George B. Whitfield, and that he ought to bestow it upon her in such a way that she could have the benefit of it at once upon his decease, and that therefore he ought not to tie it up with a trust, and that there was no reason to apprehend danger to her interest from the influence of her father.

I am unable to concur in the view of the orphans court, that the will was obtained by fraud. The decree will, therefore, be reversed, and the will admitted to probate. Under the circumstances, the costs and a reasonable counsel fee in both courts should be paid out of the estate.

ELIZA BYARD, appellant,

v.

KATE CONOVER, respondent.

A bachelor, seventy-two years old, while in a moribund condition, signed a paper purporting to be his will, and giving all of his property to his house-keeper, who had lived with him for many years. The paper had been prepared by her four years before, and she testified that he had put off executing it, although meanwhile frequently requested by her to do so. On the day when he signed it, she sent for the witnesses, told the attending physician that if the

Byard v. Conover.

testator was not going to live, she wanted to have a paper signed. None of the testator's brothers and sisters was present, or informed of the making of the will, although one brother lived in the adjoining house. To one of the witnesses, in reply to a remark that they had come to witness his will and supposed he knew all about it, he replied that he did not know anything about it. The evidence as to his intentions in disposing of his property was conflicting.—*Held*, that the paper should be refused probate, on the ground of want of capacity and undue influence.

Appeal from decree of Salem orphans court, submitted on stipulation and briefs of counsel.

Mr. W. T. Hilliard, for appellant.

Mr. A. H. Slape, for respondent.

THE ORDINARY.

This is an appeal from a decree of the orphans court of Salem county, refusing to admit to probate an instrument of writing purporting to be the will of Stephen Willis, deceased, late of the county of Salem. The testator was a bachelor of about seventy-two years of age. By the will he gives \$5 to each of his four sisters and two brothers, and then gives all the residue to Eliza Byard, his housekeeper, absolutely. She had been his housekeeper for many years. The will was signed when he was *in extremis*. He signed it at about half-past four in the afternoon, and died at about a quarter to seven in the evening of the same day. The witnesses were his physician, Dr. Patterson, and George R. Morrison, surrogate of the county. The testator was in a dying condition at the time. Dr. Patterson made a professional visit to him in the morning of the day and found him extremely ill, without perceptible pulse either at the wrist or temples, and his flesh cold. He called again at noon and found him in no better state. He came again at four o'clock in the afternoon and his condition was no better; he was nearing his end. It is very doubtful, to say the least of it, whether he had sufficient capacity to execute a will at that time. He appears not to have had the physical strength to make his mark to the instrument. It was made by Mr. Morrison's clasping the testator's hand holding the

Byard v. Conover.

pen, in his own, and guiding it in making the mark. The testator was too weak to rise or to be raised in bed. Mr. Morrison says he hardly thinks the testator could have made the mark with out assistance, and that they both together made the mark somehow. He further says that he is satisfied that the testator "intended to make the mark, at any rate." Dr. Patterson says the testator did it "in a way as if he did not seem to care." He also says he thought Mr. Morrison made some exertion to have him make his mark. The proponent requested Dr. Patterson, at his visit at noon, to bring Mr. Morrison with him at four o'clock, but he declined to do it. In answer to the question whether he would have signed the will as a witness if he had not considered that the testator was in a condition to know what he was doing, he answered that when the will was signed he was not very well satisfied with the testator's signing it; that he did not "feel entirely satisfied that he was able to execute it"—that is, that he was not satisfied that he had the requisite mental capacity. The testimony of Mr. Morrison does not establish the testator's testamentary competency. The testator, neither by word nor deed, expressed any desire to make a will. The proof is that it was the proponent and not he who wanted to have it made. She said to Dr. Patterson at noon that if the testator was not going to live she wanted to have a paper signed, and she asked him, as before stated, to bring Mr. Morrison with him at four in the afternoon, but he declined to do so. It was she who sent for Mr. Morrison. When Mr. Morrison came there she told him that the testator wanted to make a will. He set about making preparations to draw one, and she said she had one written and then handed him a paper—the one which was subsequently signed—saying that the testator knew its contents. Mr. Morrison showed the paper to the testator and asked him if he knew its contents, and he said he did. Mr. Morrison then said that there was no executor named in the will. The testator said he did not know whom to make executor, and asked how a gentleman whom he named would do, to which Mr. Morrison replied that he thought that gentleman would not care to attend to it. Mr. Morrison says the testator then did not seem to know whom

Byard v. Conover.

to name; that either the testator or the proponent suggested that he should act, but he declined, and proposed that the proponent should be appointed, to which, he says, the testator "assented—seemed to agree to it." Mr. Morrison took the paper from the room to insert a clause appointing the proponent executrix and to fill in the dates. While he was gone, Dr. Patterson said to the testator that they had come to witness his will, and said he supposed the testator knew all about it, to which the latter replied that he did not know anything about it. Dr. Patterson went into the room in which Mr. Morrison was and told him this, and the latter said the testator should know about it. Mr. Morrison says he read the will over to the testator, who seemed satisfied with it. He also says that, after the will had been signed, he asked the testator whether that was just the way he wanted to leave his property, and the testator said, in substance, that that was the best he could do with it. The testator was in a moribund condition. Dr. Patterson knew he was very near his end. He himself knew it. He said he wanted to die and go to heaven. His physical powers had so failed that he had no perceptible pulse and his flesh was cold. He was too weak to be lifted up to make his mark, and it is very doubtful whether he had strength to make his mark. Mr. Morrison, as before stated, says the testator did it, or "intended to do it." The mark was probably made by Mr. Morrison holding and moving the testator's hand in his own. He expressed no desire to make a will. He gave no instructions for any. To Dr. Patterson he said he knew nothing about it. The doctor says the greatest number of words he uttered was when he said that that was the best he could do. The proponent drew the will. She says she drew it four years before that time, and had it copied by her niece, Mrs. Scott. She says she asked Mrs. Scott's son to draw it, but he refused, and then she drew it and got his mother to copy it; that Mrs. Scott kept it until two weeks before the testator's death, when she (proponent) got it and took it home and read it to him. She says he was anxious to sign it, and on the day of his death requested her to send for Mr. Morrison, and she did so. But this does not accord with her statement that the testator

Byard v. Conover.

kept putting off signing it, nor with her application to Dr. Patterson to get him to bring Mr. Morrison, for she said she (not the testator) wanted it signed if the testator was going to die. Nor does it agree with the testator's statement to the doctor that he knew nothing about it. Though the testator's brother lived in the next house, neither he nor any of his family was informed of the proposed making of the will, nor were any of the testator's numerous brothers and sisters. The proponent is called his housekeeper. He was a day laborer. She appears to have lived in the house with him, indeed, and to have served him as a housekeeper, but merely in consideration of her having a home there. She was to have no wages and was to support herself. She says she went out to work at washing, scrubbing, or ironing, or anything she could get to do. There were no relations between them to give her any claim upon his bounty or his sense of justice. She had a child when she went there, and appears to have wanted a home. It is true there is evidence that he said he would not give his family anything, and would give his property to her, but that was said, one witness says, "as much as ten years and as late as six ago." The proponent says he said so to her four years before his death. There is also evidence, on the other hand, that he said he intended to give his property to his brothers and sisters, or some or one of them. As to what his intentions on the subject were, up to the time of the making of the will, there is no evidence, except the testimony of the proponent, and against that stand the facts that the testator had not executed the paper she prepared for him, but for four years had, as she says, kept putting it off; that she had no claims upon him; that he was not only not desirous of signing the paper when it was produced for signature, but said he knew nothing about it. The circumstances of the execution of the will are such as to lead to the conclusion that, whatever might have been his intentions, when in health, as to the testamentary disposition of his property, the paper propounded cannot be regarded as the testator's will, but rather as that of the proponent. I am of opinion, too, that the testator had not testamentary capacity. The decree appealed from will be affirmed.

Sherman v. Lanier.

ADELIA M. SHERMAN, appellant,

v.

EMILY J. LANIER, respondent.

EMILY J. LANIER, appellant,

v.

ADELIA M. SHERMAN, respondent.

1. An executrix and trustee, in good faith, loaned money of the estate, with some of her own, on the borrower's promissory note, secured by a policy of insurance on his own life. He failed to pay the subsequent premiums, and she afterwards surrendered the policy for a paid-up one of one fourth the amount of the original, the borrower being insolvent.—*Held*, that she was personally liable to the estate for the full amount of the loss.

2. The executrix (the wife) was held incompetent to prove the gift of a chattel by her husband to her, which she claimed as her own. It did not appear that any objection was made to her testimony. There was a minor interested who was not represented in the case.—*Held*, that her testimony should be disregarded, although the record did not show that objection to her competency was made at the time she offered herself as a witness.

3. A trustee invested \$10,000 of the estate in a mortgage on lands then worth \$20,000. The lands were subject to a municipal assessment of \$9,000, which was afterwards paid by the mortgagor, then a man of large means; he subsequently became insolvent, and she took from him a deed for the land, and delivered his bond to him. The assessment was afterwards set aside, the amount refunded to him, and the premises re-assessed, in her hands, for \$2,600. After her removal as trustee, she, under the order of the orphans court, conveyed the premises to her successor.—*Held*, that as no actual loss had been sustained by the estate, she could not be charged with the \$10,000, on the ground that the investment, when made, was, in fact (considering the assessment as a first lien), a second mortgage; and further, that the orphans court, while it could remove her for failure to give bond after her remarriage, had no power to order her successor to reconvey the premises to her on her paying the \$10,000, or to order him to sell the premises, and credit her with the net proceeds, the remedy, in a proper case, being in chancery; besides, if the property should eventually prove to be worth more than the investment, the

Sherman v. Lanier.

cestuis que trust would be entitled to the benefit of it. Nor, if it were conceded, would the fact that she personally received a large *bonus* for making the investment, of itself, establish bad faith on her part in making the loan, although, if shown, she would be accountable to the estate for the *bonus*. She should be required to pay costs in the orphans court only on those of her exceptions to the master's report which were not sustained.

Appeal from decretal order of Essex orphans court.

Mr. T. N. McCarter, for Mrs. Sherman.

Mr. J. W. Taylor, for Mrs. Lanier.

THE ORDINARY.

By the will of William S. Jessup, late of Newark, who died February 16th, 1873, his step-mother, then Adelia M. Jessup, now, through remarriage, Adelia M. Sherman, was appointed executrix, and also trustee for her two daughters. On her remarriage, she and her husband were, by separate orders of the orphans court of Essex county, required to give bond, according to the statute, in regard both to the executorship and the trusteeship. They failed to do so, and she was, consequently, by separate orders of that court, made in January, 1881, removed from office as executrix and as trustee, and George D. G. Moore appointed administrator *cum testamento annexo* and trustee in her stead, and she and her husband were directed forthwith to state and settle her accounts as executrix, and forthwith to pay and deliver to Mr. Moore, the administrator, the balance due, and the goods, chattels, effects and choses in action in their hands, or in the hands of either of them, and also to proceed at once to settle her accounts as trustee, and to deliver to Mr. Moore, the new trustee, immediately on demand, all goods and chattels, moneys and effects, and other assets which she or he might hold by virtue of her trusteeship and of their marriage, and forthwith, by deeds duly executed and acknowledged, and effectual in the law, to convey and transfer to the new trustee all lands and real estate, bonds, mortgages and other securities held by them or either of them in trust for, or

Sherman v. Lanier.

pertaining to the trust estate. Mrs. Sherman, on the 17th of January, 1881, before the making of those orders, filed her accounts as executrix and trustee, in which she charged herself with the amount of the inventory, \$16,778.52, and also the amount of a note of George Minchin, and interest thereon, and claimed allowance for, among other things, \$400 paid Quinby & Young, July 3d, 1873, for the price of a phaeton made by them on the order of the testator; also (under date of October 3d, 1873) for the amount of an investment of \$10,000 made by her on the bond and mortgage of Henry G. Cook, for which, the principal being unpaid, and the interest in arrear, she accepted from the mortgagor, under the advice of counsel, a deed for the property, and surrendered the bond. The deed was dated March 14th, 1878. She claimed allowance, also, for the amount, \$2,000, of the loan to George Minchin, and a loan of \$2,000 to Ebenezer Harrison on his promissory note. On the 12th of April, 1881, by deed of that date, she and her husband, pursuant to the direction of one of the before-mentioned orders, conveyed to Mr. Moore, as trustee, the above-mentioned premises conveyed to her by Cook. That property consists of ten lots on Belleville avenue, in Newark. Mr. Moore accepted the deed, and caused it to be recorded, and he still holds the title under it. Exceptions were filed to Mrs. Sherman's account by Mrs. Lanier, one of her daughters. They were referred to a master in chancery, who reported that the accountant should be charged with the price of the phaeton, which she had taken and used as her own, claiming that the testator ordered it for her and gave it to her. Also, that she should be charged with the amount of the loan to Harrison, with interest for two years and seven months, and the amount of the loan to Cook, with interest from October 3d, 1876, the date of the last payment of interest thereon, to January 3d, 1881, four years and three months, and that the amount of the Minchin note should be disallowed. The accountant excepted to the report, and, on hearing, the orphans court, by its decretal order of January 30th, 1883, overruled the exceptions, and sustained the report, except as to the Minchin note, the amount of which the court held should be allowed to her, on the

Sherman v. Lanier.

ground that the money lent constituted part of the amount of the inventory. And the court also, by the same decretal order, ordered that Mr. Moore, the trustee, on being paid the amount charged against her for principal and interest on the loan secured by the Cook mortgage, convey the property back to her, or credit her with the net proceeds of those premises, on a fair sale thereof. It also ordered that the taxable costs of the exceptant, excluding the master's fees, and those of the stenographer in taking and preparing a transcript of the evidence before the master and the court, together with a counsel fee of \$300 to the exceptant's counsel, be allowed out of the funds of the estate in the hands of Mr. Moore, the trustee, and be paid by him in the first instance, and that the amount so allowed and paid by him, excepting the counsel fee, be charged to the accountant, and by her paid, out of her private estate, to the trustee.

From so much of that order as charged her, Mrs. Sherman appealed to this court. Mrs. Lanier also appealed from that part of it which allowed to the accountant the amount of the Minchin note.

There is no error in the order under review so far as that note is concerned. The appeal in reference thereto was, in fact, abandoned on the hearing.

Nor is there error in the disallowance of the loan of \$2,000 to Ebenezer Harrison. The money was, with \$1,000 of her own funds, lent by Mrs. Sherman to Harrison upon his promissory note, without other security than a policy on his life for \$3,000. He paid the premium on the policy for a few years, and then ceased, and she, as she says, feeling that she could not afford to pay the premiums, surrendered it in consideration of a paid-up policy of \$525 issued to her instead of it. Harrison is insolvent. It was clearly a breach of her duty to invest on such security, and the money is wholly lost. She is therefore chargeable with it and the interest thereon. On paying the money and interest, she will, of course, be entitled to the note and policy.

She should be charged, also, with the price of the phaeton. She alleges that it was a gift to her from the testator; that it

Sherman v. Lanier.

was given to her in exchange for another one of hers which he had sold, and never accounted to her therefor in any way. It appears that the testator bought and paid for that carriage also. She says he gave it to her. Nevertheless, he appears to have sold it as his own and kept the proceeds. But whatever may have been her title to that carriage, she has not established a legal title to the one in question. She says the testator sold the other phaeton because it was too heavy for her horse (the horse belonged to her first husband's, the testator's, father's estate); that he promised to have one made for her in return for it; that he then ordered the carriage in question; that almost the last time he went out of the house, which was about three weeks before his death, he and she went to the carriage-makers' shop (Quinby & Young's), and the carriage was then in the store-room there; that she thinks it was finished but not yet dry; that the testator and she both got into it and sat down and tried it; that as they had no place in which to keep it, the testator asked Mr. Young if he would keep it for her until the stable, which she was then building, should have been finished; or, as she afterwards states it, they did not want it and had no place in which to put it, and "it was talked of to Mr. Young that his firm should keep it until Spring." In the early part of her testimony she says that the carriage was not finished when the testator died (which was in February, 1873), and that it was not delivered by the carriage-makers until about the 29th of April following; but she afterwards testifies that when she and the testator went to look at it, it was lined and painted, but the paint was not yet dry, and that it seemed to be finished. The proof is not satisfactory. There is no evidence either as to the gift or the delivery, except the accountant's own testimony, and that, under the circumstances, is wholly incompetent on both of those heads. *P. L. of 1880 p. 52; Smith v. Burnet, 7 Stew. Eq. 219; affirmed on appeal, 8 Stew. Eq. 314.* She was called as a witness in her own behalf on the subject, and although it does not appear by the record that objection was made to her testimony on the ground of incompetency, yet the court may and ought, itself, of its own motion, to reject it. In proceedings of this sort others besides the parties

Sherman v. Lanier.

litigant may be interested in the result, whose interests it is the duty of this court to protect against the result of unlawful testimony admitted without objection. In this case there is a minor not represented, who has an equal interest with the exceptant.

The court, by the decretal order, charges Mrs. Sherman with the amount of the Cook loan (\$10,000) and the interest thereon from October 3d, 1876, up to which time she received interest thereon. She took the title to the property in March, 1878. It is admitted, as appears by an entry on the record, that Cook was then insolvent, and has been ever since. The property has not been sold, and it does not appear that the estate will sustain any loss by that investment. It is urged, on behalf of the respondent, that the investment was one which the court would not sanction; that the property was subject to a liability to a paramount lien of large amount for benefits for widening Belleville avenue, so that, in fact, the mortgage was not the first, but the second lien upon the premises. The assessment had not been made at the date of the mortgage, October 3d, 1873. It was ratified August 17th, 1874. The amount assessed on the premises was \$8,923.11, and it was paid, presumably by Cook, two days afterwards. The assessment was subsequently set aside and the money refunded to Cook by the city in 1876. A new assessment was made, which was confirmed May 22d, 1880, over two years after the conveyance had been made to Mrs. Sherman. The amount then assessed upon the property was \$2,602. Mrs. Sherman undoubtedly thought the premises were good security for the loan when it was made. They are shown to have been at that time of large value. One witness says they were then worth \$25,000, and two others, one of them, at least, an expert in the value of real estate in Newark, \$20,000. At the latter valuation there was an excess of value of about \$7,000 over the encumbrances, putting down the assessment at \$2,600. And at that time the mortgagor appears to have been abundantly able to remove the paramount lien of the assessment, and he did it at once, as soon as it was ratified, although, as appears by the reassessment, it was over three times as much as it ought to have been, and was the large sum of nearly \$9,000. She appears to

Sherman v. Lanier.

have acted circumspectly in making the investment; to have taken advice of persons whom she regarded as competent judges of the value of the property before making the loan, and to have been satisfied that the investment was a safe one. She had legal counsel in the matter, also; and she acted under the advice of counsel in taking the conveyance in satisfaction of the debt after the mortgagor had become insolvent. There is no reason to doubt her *bona fides* in either transaction. If she acted in good faith, the fact that the premises were liable to a paramount lien would not of itself make her chargeable with the money lent. Perhaps the estate will meet no loss by the investment. If so, she will have incurred no liability. Where a trustee has made, as she did in the case of the Harrison loan, an investment wholly unallowable, and the money is lost, he is of course chargeable with the amount of the loan; but where an investment has been made on second mortgage and it has not been ascertained, and does not appear, that there will be a loss, the mere fact that it was an investment on second mortgage will not of itself make the trustee chargeable with the money. The prior encumbrance may be comparatively insignificant, or, if not, it may be of an amount not so large as to endanger the security. In any such case, where the trustee has acted in good faith, it must be ascertained that there will be a loss before the trustee can be called upon to answer for having made the investment. In this case the trustee has transferred the security (as she was bound to do) to her successor, and has lost all control over it. To charge her with the money invested is to assume that there will be a total loss (which would be an unwarrantable assumption), or that she has acted in bad faith, a conclusion not justified by the evidence. The question of her liability must be left to a later day, when it shall be known that the estate has sustained a loss, and to another tribunal.

It is urged, however, that it is proved that the trustee stipulated for and received a large premium on the loan for her own personal advantage, and that this of itself is evidence of bad faith in making the investment. If the fact were conceded, it not only would not establish bad faith, but it would be but

Sherman v. Lanier.

slight, if indeed it would be any evidence that she knew she was making a bad investment for the estate. The evidence in reference to the taking of the premium is extremely conflicting; but it is unnecessary to pass upon the weight of it. Mrs. Sherman testifies that she had of the money of the estate to put into this investment an amount a little less than \$9,050, and that the balance of the \$10,000 was made up of her own money; so that of the money of the estate there were only about \$9,000 in fact invested. If the full amount due the estate on the investment shall be realized out of the property, the question will be of no importance. If she took the premium she has received only about \$50 of the money of the estate for which she would be accountable on that head. There is another consideration of some weight against the action of the orphans court in this matter, which is deserving of mention. If it should turn out that the property is of greater value than the amount of the investment, the *cestués que trust* are entitled to the benefit of it. It is necessary to await the disposition of the property by the trustee before the question of her liability can be properly and fairly dealt with. The orphans court had power to remove Mrs. Sherman, because she did not give bond when required, in view of her remarriage, and it had power to require her to turn over the trust estate to her successor, but it had not jurisdiction to order the latter, on her paying the amount charged against her in respect of the investment, to convey the property back to her or to sell it and credit her with the net proceeds. By the one hundred and twenty-second section of the orphans court act (*Rev. p. 779*), the orphans court has power, where a female trustee under a will has married, to remove her unless she and her husband shall give bond for the faithful performance by them of the trust reposed, and the true payment of all moneys of the estate which shall or have come into the hands of the trustee before her marriage, or shall be received by her or her husband after the marriage. The section provides that nothing therein contained shall be construed to release the husband and wife, or either of them, from any previous neglect, default or breach of trust, or from any liability to account as before the passing of the act. By the one hundred

Sherman v. Lanier.

and twenty-ninth section (*Rev. p. 781*) power is given to the court to appoint a successor to such removed trustee, and it is provided that such successor shall have power and authority to demand, receive and recover the property and assets of the estate, and to maintain all proper actions at law or in equity for the recovery thereof. By the next section it is provided that a trustee who shall have been removed or discharged under the act, shall immediately deliver over to his successor all goods and chattels, moneys and effects and other assets which he shall hold as trustee, and settle his account and pay the balance to his successor, as the circumstances of the case may require or the court order; and that the court may enforce obedience to its order by fine for the benefit of the estate. By the one hundred and thirty-first section (*Rev. p. 782*) it is provided that the removal of the trustee shall not release or discharge him from liability for the estate or any part thereof which has been received, or which ought to have been received by him, or for any neglect, default, miscarriage or breach of trust in the execution of his office, and that his successor may have actions of trover, detinue, or in case, for such goods and chattels as shall have come to the possession of the removed trustee, and for any breach of trust, waste, embezzlement or misapplication thereof, and may proceed by actions at law or in equity for the recovery of the assets of the estate, either against the removed trustee or any other person into whose possession such assets shall have come or in whose hands they may be. The intention of the legislature was to give the court certain powers for the protection of certain trust estates. It is in such cases as this to require the trustee and her husband to give bond, and on their failure to do so to remove her; to compel her to deliver over to the new trustee the goods, chattels, moneys and effects, or other assets which she may hold as trustee, and to settle her account and pay the balance of her account when settled. The accountant has obeyed the order of the court, and has transferred the property to her successor. She is entitled to the allowance of the amount of the investment in her account, but her successor may bring the question of her liability in respect thereof to an adjudication in the court of chancery, which is the appropriate forum. It cannot,

Dey v. Codman.

for the reasons before given, be passed upon in these proceedings in the orphans court.

In the case of *Hunt v. Mayberry*, 5 *Dutch*. 403, it was said in reference to the nineteenth section of the act of 1855 (*Rev. p.* 778 § 118), that the design of the legislature was not to confer on the orphans court all the powers the court of chancery has over cases of administration, guardianship and trusts, but to give a new jurisdiction, or rather to enlarge the jurisdiction, over a class of persons already subject to the power of the court. So, in the legislation under consideration, the intention of the legislature was to confer certain powers, and certain powers only, on the orphans court, and not all the powers which the court of chancery would have over the subject.

So much of the order appealed from as charges the accountant with the amount of the Cook loan and interest, will be reversed, together with the direction to the trustee in connection therewith. So, also, will the award of costs. The accountant should, in the orphans court, pay only the costs of those of her exceptions to the master's report which were not sustained in the orphans court; the rest of the costs of the exceptions should be paid out of the estate. In all other respects the order will be affirmed. The accountant is entitled to costs of both appeals.

J. WARREN S. DEY, appellant,

v.

JOHN CODMAN et al., executors of ANTHONY DEY, deceased,
respondents.

1. Where executors were not chargeable with the deficiencies arising from the foreclosure and sale of premises under mortgages belonging to the estate, they were allowed therefor in their final account, they having been charged with the full amount of those mortgages in their first account.

2. *Held, also*, that they were not chargeable with the amount of a mortgage which was satisfied during their testator's lifetime, but canceled of record by them after his death.

Dey v. Codman.

3. They were allowed for taxes paid and for repairs and improvements made on the testator's homestead after his widow ceased to reside therein. By the terms of the will, the executors held it in trust for her and her daughters to live there while they were unmarried, for their natural lives, with a provision that they might sell in certain contingencies, which power was not exercised until ten years after the widow's death.—*Held, also*, that she should have paid the taxes and costs of repairs and improvements while occupying it, and also after she ceased to occupy it but received the rents therefrom.

4. They were allowed for traveling expenses actually incurred and paid by them, and also the amount of a salary paid to an agent employed by them about the business of the estate, such amount having been taken into consideration in fixing their commissions.

5. They were allowed for payments of certain municipal assessments levied on lands of the estate, although the statute under which similar assessments were laid was afterwards declared by the courts to be unconstitutional; and also for other municipal assessments subsequently paid by them in good faith and with discretion.

6. They were held not liable for refusing an offer of \$30,000 for certain lots of the estate which had been valued by a reputable local expert at \$95,000, and shortly afterwards, at their request, with a view to fixing a price which would invite buyers, at \$65,000, although the lots were afterwards, in order to close the estate and to pay certain assessments thereon which the estate had no funds in hand to pay, bought in at public sale for \$1,470, under an agreement by all those interested, (including the executors,) except the appellant, whose interest is one thirty-second part. The agreement was to sell for the best price obtainable, and if one R. should buy he should hold the lands in trust, to be divided among the parties. The sale was extensively advertised and R. was the successful bidder, and the lots were divided accordingly. The value of all lands greatly depreciated by the panic of 1873, after the \$30,000 were offered for the lots.—*Held, also*, that they were not liable for a loss sustained on a sale of the homestead through the same causes, its value being also affected by the existence of the testator's surviving daughters' contingent right to occupy it.

7. They were allowed for the payment of a commission of \$300 to a broker who secured a purchaser for them of part of the testator's lands for \$15,000.

8. They were held not liable for the non-collection of deficiencies on the sale of mortgaged lands, there being no proof that those deficiencies could in any case have been collected.

9. They were allowed for counsel fees paid, where the services appeared to have been necessary and properly rendered. The question of the allowance for some of those professional services had been considered by the orphans court, when a former account was passed, and they were then allowed.

10. The entire amount of the cash on hand at the settlement of the first account was charged to them in the second account as cash on hand, without deducting therefrom the amount of the commissions due them as fixed by the

Dey v. Codman.

court, and also the surrogate's fees on the first account. The second account was rectified by making those deductions.

On appeal from decree of Hudson orphans court upon the final account of executors.

Mr. William P. Wilson and *Mr. W. C. Spencer*, for appellant.

Mr. John Linn and *Mr. Cortlandt Parker*, for respondents.

THE ORDINARY.

This is an appeal from the decree of the orphans court of Hudson county made upon the settlement of the final account of the executors of Anthony Dey, deceased, upon exceptions of the appellant to that account. The objections, which were numerous, were all overruled, but the court corrected the account by ordering the deduction of \$68 from the amount of two items charged under date of July 28th, 1869, and of \$28.08 from the charge of \$604.17, under date of May 8th, 1874, and reduced the amount of commissions, as stated by the surrogate in the account, from \$1,178.66 to \$467.17, and fixed the balance in the hands of the executors for distribution at \$605.63.

The grounds of the appeal are the following: First and second. Because the court did not decree that the balance (\$6,565.16) brought forward from a former account settled on July 14th, 1869, was not the true balance in the hands of the executors, and because the court did not charge the executors with the amount of the balance as shown by the account, \$32,652.62. Third. Because the court did not decree that the charge of the amount of the inventory in the account of 1869 was not incorrect, the appellant insisting that the decree should have charged, in addition to the amount of the inventory, the amount of a mortgage for \$6,921.61, dated August 1st, 1853, and given by Edgar M. Smith to the testator, Anthony Dey. Fourth. That the court did not decree that the executors were not entitled to an allowance for money paid to the wife of the testator out of the capital of the estate, but allowed for those moneys. Fifth. That the

Dey v. Codman.

court did not decree that the executors were not entitled to an allowance of all sums of money in excess of \$600 a year (presumably reference is made to payments to the widow of the testator) before they invested the sum of \$10,000 for her, as directed by the will, but, on the other hand, allowed such sums. Sixth. That the executors were allowed for payments made on account of the testator's homestead after the widow ceased to reside there, she having, after leaving, rented it and received the rents thereof, and repairs and improvements having been made at the expense of the estate; the appellant insists that the executors should have taken charge of and rented the property for the benefit of the estate so soon as she ceased to reside there. Seventh. That the court allowed the salary paid to Anthony Dey, Jr., for his services as agent of the executors, and allowed, also, for traveling expenses. Eighth. That the court allowed, in the account, the amount of assessments on lands in East Newark, owned by the estate, paid by the executors, as follows: In 1872, \$795.02; in 1874, \$311.20; in 1876, \$604.16. Ninth. That the court did not charge the executors with the loss occasioned to the estate by their refusal to accept a cash offer of \$30,000 for the East Newark property, which they afterwards sold for \$1,470. Tenth. That the court did not charge the executors with the loss occasioned by their selling the homestead for a grossly inadequate price, viz., \$250, whereby there was a loss of over \$14,750, besides interest. Eleventh. That the court allowed to the executors money paid to Caroline R. Bill, as follows: January 5th, 1870, \$2,000, and April 17th, 1871, \$1,300, which payments, the appellant insists, were contrary to the provisions of the will. Twelfth. That the court allowed the charge of \$300 paid to T. P. Ranney as his commissions on a sale of land. Thirteenth. That it did not charge the executors with the loss occasioned to the estate, as alleged by the appellant, by their failure to collect the deficiency on the sales of mortgaged premises on the bonds held by the estate, which the mortgages were given to secure. Fourteenth. That the court allowed certain counsel fees without showing what the services were for which they were paid. Fifteenth. That the court allowed excessive commissions, and

Dey v. Codman.

did not decree that the two sums of \$944.45, which appear by the account to have been paid July 28th, 1869, to the executors as commissions, should be disallowed. Sixteenth. That the accounts are incomplete, fragmentary and unintelligible. Seventeenth. That the court did not decree that the sales made by the executors (presumably referring to the sales of the East Newark property and the homestead made to Edward C. Richards) were *not* illegal; and, Eighteenth. That the decree is in other respects irregular, informal and erroneous.

As to the first and second grounds of appeal: By the account settled in 1869, there appeared to be a balance against the executors of \$32,652.62; in the final account the balance which is brought forward from that account is only the sum of \$6,565.16. The difference appears to have been occasioned by the deduction from the balance of the first account of sums of money which the executors had failed to collect upon mortgages which constituted part of the inventory, and which were subsequently foreclosed, and large deficiencies left after the sale of the mortgaged property. If the executors were not chargeable with the deficiencies, then there is no error in this method of settlement, for the final account shows the true balance with which the executors were chargeable at the filing of the account, in respect to those things which entered into the former account.

As to the third: The appellant claims that the mortgage for \$6,921.61, given by Edgar M. Smith to the testator in 1853, should be accounted for by the executors as having been collected by the estate, inasmuch as it appears, by the entry upon the record of the mortgage, that it was receipted after the testator's death, in the name of the executors, by Anthony Dey, Jr., their agent, upon which receipt, and the production of the mortgage, the latter was canceled January 12th, 1860. It appears very clearly by the evidence that this mortgage had been paid off before the testator's death. It was given to secure the payment of nine notes, altogether for \$6,921.61, maturing, the earliest in 1853, and the latest in March, 1855. The testator died in August, 1859, four years after the maturity of that one of those notes which had the longest time to run. It appears, by

Dey v. Codman.

the testimony of James R. Dey, son of the testator, that the notes were all paid. He appears to have been conversant with his father's business, particularly with regard to the mortgage in question, which had its origin in his discovery of an error in computation of an account between his father and persons with whom he was interested in real estate transactions. He swears that his father told him that they were all paid. He qualifies the statement, however, by saying that what his father said was, that he had no more of the notes—that is, that he had used them up. He further testifies that the notes were not all paid at maturity, though some of them were. The original mortgage was not produced. We are, therefore, without the advantage of knowing what endorsements of payments (if any) were put upon it by the testator. It is clearly shown that no money was received by the executors in consideration of the receipt before mentioned, given in their behalf. The mortgage appears to have been in the hands of the late Abraham O. Zabriskie, as attorney for some one. He applied to Anthony Dey, Jr., the agent of the executors, to have it canceled, on the assumption that it was paid, and the receipt before mentioned was given. Mr. Dey swears that the mortgage was never in possession of himself or the executors; that he presumes that he signed the acquittance on the production of the notes, and that neither he nor the executors received anything in consideration of the cancellation or receipt. It will be observed that the mortgage was canceled in 1860, more than twenty years ago.

The fourth and fifth grounds were not presented for adjudication on the argument.

As to the sixth: The appellant insists that the executors should not be allowed for taxes paid and repairs or improvements made on the homestead after the widow ceased to reside therein. By the will the testator provides that the homestead and such of the furniture therein as belonged to him, should be held by his executors and trustees in trust for the use and occupation of his wife so long as she might live and remain his widow, and for such of his daughters as might remain unmarried or be in a

Dey v. Codman.

state of widowhood, for and during their natural lives, and that after the death of the survivor of them, the property should be sold for the best price that could be had therefor, at public auction or private sale, and the proceeds fall into the residue of his estate; and that if the persons entitled to the use and occupation of the estate might desire to sell it and remove from it, or if at any time they should unanimously agree to sell and quit the property, then they might do so, and the proceeds should be divided among such of them as were entitled to his residuary estate. It appears that the widow ceased to occupy the homestead before her death, which occurred April 12th, 1871; that she rented the property from the time she left it until her death, and took the rents for her own use, her construction of the devise just quoted being that she was entitled for life to the use of the property, either personally or by her tenants. Under such a gift, the donee is not confined to the personal use of the property, so that he is debarred from letting it during the continuance of his interest. *King v. Easington*, 4 T. R. 177; *Rabbeth v. Squire*, 4 De G. & J. 406; *Ingersoll v. Ingersoll*, 9 Stew. Eq. 127.

But the widow in this case was bound, as equitable life-tenant, to pay the taxes and all necessary repairs. It appears from the evidence that she paid the taxes so far as her means would allow, and the balance was paid by the executors. It would seem that the repairs and improvements which were put on the property were also paid for by the executors out of the estate. The property was not sold until about ten years after the death of the widow, but it is to be remembered that the title was clouded by the provision for the benefit of the testator's daughters, either while unmarried or when they should become widows. The evidence in the case is not such as to warrant charging the executors with any rent for the property after the death of the widow, or to justify a refusal to allow the executors for the repairs and improvements.

The seventh ground of objection is, that the court has allowed for the salary of Anthony Dey, Jr., agent of the executors in the business of the estate.

Dey v. Codman.

It is enough to say on this head that it appears that the fact that the salary was paid out of the estate to this agent was taken into account in fixing the amount of the commissions of the executors. The settlement of the estate began in 1859, and the account was filed in 1880. So it appears that twenty-one years, or thereabouts, elapsed from the beginning of the settlement of the estate until its termination. For the compensation of the agent \$4,200 in all were allowed; in addition whereto, commissions to the amount of only \$2,288.06 were allowed to the executors. The commissions allowed in the account of 1869 were \$1,820.90; in the final account, \$467.16. The executors were entitled to commissions upon about \$160,000; the commissions on which, at five per cent., would be about \$8,000. The salary of the agent and the commissions allowed are less than \$6,500 altogether. The objection is made, in this connection, to the allowance of traveling expenses to the executors. The amount is not large under the circumstances. The expenses appear to have been *bona fide* incurred and paid, and they are allowable in addition to commissions. The statute provides for the allowance of commissions over and above the actual expenses. *Rev. p. 776 § 110.*

Eighth. The appellant insists that the executors ought not to be allowed for the amount of certain municipal assessments paid by them on certain lots of land of the estate in East Newark. These payments were made in 1872, 1874 and 1876. The ground of objection is that the acts under which those assessments were made did not limit the assessment of benefits to the advantage derived by the property from the municipal improvement. It is to be remembered that the decision which established the unconstitutionality of such provisions in municipal charters was not made until March, 1874, and that it reversed the decision of the supreme court sustaining an assessment under such a provision. *Agens v. Newark, 6 Vr. 168, 8 Vr. 415.* So that, when the assessment of 1872 was paid, such legislation had not passed under judicial condemnation. As to the other two assessments, it will be enough to say that the executors appear in this matter, as in all other things in their management of the

Dey v. Codman.

estate, to have acted in entire good faith, and to have exercised care and discretion in their dealings with reference to it. These payments were not only made in good faith, but it appears they were made by the advice of counsel. They were made in respect to municipal improvements, the benefits of which were to be reaped by the property.

The ninth ground of appeal is that the executors refused an offer of \$30,000 for the East Newark property, and afterwards sold the property for \$1,470 over and above taxes and assessments; so that, as the appellant insists, a loss of over \$28,500 occurred to the estate from their mismanagement. As has just been said, it appears that the executors acted *bona fide* in all their transactions touching the estate. The offer of \$30,000 cash was made to Dr. Nichols, one of the executors, about 1873, by Joseph M. Duclos. He declined it on the ground that it was not sufficient—that the property was worth far more. Subsequently, Dr. Nichols met Mr. Duclos, and requested him to make another offer of a larger sum, and the latter testifies that he believes he went again to see Dr. Nichols in 1874, and that then he offered him a little more than \$30,000. There were about one hundred and thirty lots in the property, all unimproved. With a view to their guidance in disposing of this property, the executors had employed a competent person, Edward M. Reilley, living in East Newark, and well acquainted with the value of real estate there, to make an estimate of this property, in order that they might understandingly fix a price upon it, with a view to selling it for the benefit of the estate. The value of the property was fixed by that person at \$95,000. They requested him to reconsider the matter, and fix such a price upon the property as would invite buyers. He did so, and reduced the valuation to about \$65,000. When Mr. Duclos made his offers for the property they were declined merely because they were not more than about one-third of the value of the property as fixed by Mr. Reilley, and not one-half of the amount fixed by the same person when he put the valuation so low as to tempt buyers.

The refusal to accept the offers was, as the executors believed at the time, in the interest of the estate, in which both Dr.

Dey v. Codman.

Nichols and Captain Codman were interested through their wives, who were daughters of the testator. Shortly after the refusal the panic of 1873 came, and there was no longer any sale for such property. It appears by the evidence that the taxes and assessments were left unpaid on the property because of want of funds of the estate wherewith to pay them, and that, for the purpose of closing up the estate, it was determined by the executors to sell the property for the best price that could be got for it. It was extensively advertised for several weeks, and every effort made to sell it at a good price. The result, however, was that it was sold to Mr. Richards. The sale was a public one, and he was the highest bidder. There was an understanding, however, between him and those interested in the property, with the exception of the exceptant (whose interest is one thirty-second part), that he took the title in trust for the persons interested in the property under the will, to make a fair and satisfactory division thereof among them. The evidence shows, it may be observed, that he has made a division and conveyance to all except the appellant, who has refused to accept a conveyance or in any wise recognize the validity or propriety of the sale. Under the circumstances, in view of the fact that the refusal to accept the offers made by Duclos in 1873 and 1874 was due to a desire on the part of the executors to get a fair price for the property, and that the low price at which it sold, subsequently, was due to the depreciation in real estate, especially property of that character, which began in 1874 or thereabouts, and continued for many years, there is no ground for charging the executors with the difference between the price for which the property could have been sold to Duclos and the price at which it was actually sold, subsequently. Such a charge must necessarily be based upon bad faith or gross mismanagement. It is impossible to find either in this transaction.

The same considerations apply to the sale of the homestead. In that case, it should be added, there was hindrance to the sale of the property from the fact of the existence of the interests of the daughters of the testator therein. It may be further remarked that in regard to both of these sales the question of lia-

Dey v. Codman.

bility of the executors was considered and passed upon by the court below, upon an examination into all the facts, the same which are now before me, and that, in their judgment, the executors incurred no liability in the transaction for damages for fraud or the mismanagement of the estate.

The eleventh ground of appeal was not mentioned upon the argument. That objection appears to have been based upon mistake.

The twelfth is an objection to the allowance to T. P. Ranney of \$300 for brokerage on the sale of real estate by the executors, through him, for \$15,000. It appears, by the evidence, that Mr. Ranney, who was the attorney and counsel for the executors, had interested himself to find a purchaser for the property for the executors, and had secured one. For these services he demanded commissions by way of brokerage, which were paid to him accordingly. There is no good ground for disallowing the charge.

The thirteenth ground is in reference to the non-collection of deficiencies on sale of the mortgaged premises. There is no proof that the deficiencies could in any case have been collected. All the evidence on the subject is to the contrary.

The fourteenth is an objection to the allowance of counsel fees, because it does not appear what services were rendered for them. This objection, so far as it affects the allowances in the first account, cannot be entertained. The question of the propriety of those allowances was before the court when that account was passed, in 1869, and though evidence has been introduced to show the propriety of those charges (of which there seems no room to doubt), it should be said that as to them the account of 1869 must be regarded as conclusive. *Reynolds v. Jackson*, 9 *Stew. Eq.* 515.* And as to those appearing in the final account, the services are sufficiently shown, and they ought to be allowed.

The fifteenth refers to the commissions, and objects to them on the ground that the allowance is excessive, and it objects, also, to two charges of \$944.45 for money paid July 28th, 1869, to

* NOTE.—This case has been reversed. See *Jackson v. Reynolds*, 12 *Stew. Eq.* —REP.

Dey v. Codman.

John Codman and Isaac A. Nichols, the executors, respectively. Enough has been said already on the subject of the allowance of the commissions. The two charges referred to appear to have been intended to be for the commissions allowed in the first account, \$1,820.90, which had been divided between the two executors. There was, however, an error of \$68 in the computation; the two sums of \$944.45 together amounting to \$1,888.90 instead of \$1,820.90, the amount allowed. This the orphans court corrected by directing a reduction of \$68 in respect to those two items. The reason for charging those commissions in the final account, although they had been allowed in the first account, appears to have been as follows: The balance shown by the first account was \$32,652.62, of which \$27,968.41 were the amount of the inventory. In that account the executors were charged with the amount of the inventory, and also with the cash balance in their hands of \$6,565.11, altogether \$34,553.52; from which were to be taken the commissions, \$1,822.90, allowed in that account, and \$60 for the surrogate's fees for auditing the account, altogether \$1,880.90; leaving a balance of \$32,652.62, which was made up of cash, \$4,684.21, and the amount of the inventory, \$27,968.41. Although the commissions allowed in the first account and the amount of the surrogate's fee were deducted from the credits of that account, in the final account the executors were charged with the entire cash balance before mentioned, \$6,565.11, and credited with the amount of commissions and surrogate's fees. The reason for the credit was, it will be seen, the fact that the entire cash balance on the first account was credited on the second.

The sixteenth ground is, that the accounts are incomplete, fragmentary and unintelligible. This objection, except as to the apparent discrepancy arising from the difference between the balance charged against the executors in the first account and that charged against them in the second, is not well taken; but in that respect the account is faulty and ought to be corrected.

The seventeenth ground is, that the court should have decreed that, inasmuch as the executors were individually interested in the sales of the real estate, the sales were illegal, and that it

Rogers v. Hand.

should have charged them with loss occasioned to the estate by reason of the failure to sell when a better price could have been obtained. This objection has already been considered under another head.

The last ground is merely the usual general objection of irregularity, informality and error. After what has been said on the subject of the other grounds, it needs no attention.

The decree of the orphans court will be affirmed; the costs of both sides to be paid out of the estate. The final account should, however, be restated so as to explain the discrepancy before mentioned.

BENTLEY W. ROGERS et al., appellants,

v.

JONATHAN HAND et al., executors &c., respondents.

1. A testator gave to his housekeeper \$1,000, absolutely, and the interest on \$8,000 during her lifetime. She had occupied the position of housekeeper in his family for twenty years or more. She presented to the executors a claim for \$3,000 and interest (*i. e.*, \$500 a year for the preceding six years) for her services to the testator.—*Held*, that the executors, in the exercise of good faith and discretion, were justified, after she had threatened to bring suit on her claim, in compromising it for \$3,000; that the testamentary gifts to her were not in satisfaction of her claim for services, and that a mere notice, given by the residuary legatees to the executors not to pay her claim, was not sufficient to prevent the executors from compromising it.

2. A commission of three and a half per cent. on \$289,000 was approved, in a case where the executors had been compelled to carry on litigation; to investigate and ascertain exactly what land the testator owned, and to exercise a testamentary power to sell it.

Appeal from the decree of Cape May orphans court.

Mr. D. J. Pancoast, for appellants.

Mr. W. E. Potter and *Mr. P. L. Voorhees*, for respondents.

Rogers v. Hand.

THE ORDINARY.

THE controversy between the parties to this appeal is as to the allowance to the respondents, executors of the late Edmond L. B. Wales, deceased, in their account, of the amount of \$3,000, paid by them in compromise of a claim made by Mrs. Eliza Adams against the estate for services rendered by her as house-keeper for the deceased for six years next preceding his death; and also as to the amount of commissions which should be allowed to the respondents for settling the estate. The testator died August 19th, 1882, and the will was proved on the 30th of the same month. The appellants insist that the payment to Mrs. Adams ought not to have been allowed, and that the allowance of commissions is excessive, and they appeal accordingly.

The claim of Mrs. Adams was put in on oath before the expiration of the time limited by the order to limit creditors. It

NOTE.—As to the validity of a contract based on an executor's forbearance to sue, or extension of time for payment, *Yard v. Eland*, 1 *Ld. Raym.* 368; *Young v. Mackall*, 4 *Md.* 362, 3 *Md. Ch.* 398; *Clawson v. McCune*, 20 *Kan.* 337; *Martin v. Turver*, 43 *Miss.* 517; *Smarr v. McMaster*, 35 *Mo.* 349; *Puckett v. James*, 2 *Humph.* 565; see *Heath v. Grinell*, 61 *Barb.* 190; *Kennedy's Appeal*, 4 *Pa. St.* 149; *Burnham v. Dalling*, 3 *C. E. Gr.* 132; or receiving payment in depreciated currency, *Bailey v. Dilworth*, 10 *Sm. & Marsh.* 404; *Smith v. Prothro*, 2 *S. C.* 371; or in chattels, *Gulledge v. Berry*, 31 *Miss.* 346; *Williams v. Maitland*, 1 *Ired. Eq.* 92; or promissory notes, *Anderson v. Gregg*, 44 *Miss.* 170; *Leland v. Manning*, 4 *Hun* 7.

In *Murray v. Blatchford*, 1 *Wend.* 583, a compromise with a debtor of the estate, made by two administrators against the consent of their co-administrator, and after notice by him of an application to remove them, one for insolvency and the other for incapacity, the compromise being made contrary to the wishes of one-third of the persons entitled to distribution, was sustained.

If for the benefit of the estate, an executor may compound or release a debt, *Blue v. Marshall*, 3 *P. Wms.* 381; *Larne v. White*, 8 *Dana* 45; *In re Scott*, 1 *Redf.* 234; *Gillespie v. Brooks*, 2 *Redf.* 349; *Pusey v. Clemson*, 9 *Serg. & R.* 204; *Bruner's Appeal*, 57 *Pa. St.* 46; *Daniel v. Muclins*, 6 *Munf.* 61; *Kee v. Kee*, 2 *Gratt.* 116; *Stuyvesant v. Hall*, 2 *Barb. Ch.* 151; see *Legh v. Holloway*, 8 *Ves.* 213; *Hammond v. Hammond*, *L. R.* (8 *Irish Eq.*) 322; *Aikins v. Bluin*, 11 *Grant's Ch.* 212; *Fridge v. Buhler*, 6 *La. Ann.* 272; *Verdier v. Simons*, 2 *McCord's Ch.* 385; (but not his own debt, *De Cordova v. De Cordova*, 41 *L. T. (N. S.)* 43; *Baughn v. Shackelford*, 48 *Miss.* 255; *Geigers v. Kaigler*, 9 *S. C.* 401); and so may a trustee, *Gorge v. Chansey*, 1 *Ch. Rep.* 125; *Atty.-Gen. v. Launder-*

Rogers v. Hand.

was for \$500 a year for six years immediately preceding the testator's death, and interest thereon. Mrs. Adams had been the testator's housekeeper for from twenty to twenty-five years before his death. He was a widower for about the last forty-five years of his life. The appellants insist that the provision made for her by his will should be held to be a satisfaction of all claim on her part against his estate for services. By the will, which was made in February, 1881, he gives to her \$1,000 absolutely, and the interest of \$8,000 for life. By a previous provision therein, he directs that all his just debts and funeral expenses be duly paid and satisfied by his executors as soon after his decease as it can be done conveniently. There is no statement, nor any indication whatever of any intention that the gift to her shall be a satisfaction of any claim on her part against the estate. The legacies cannot be regarded as a satisfaction of the claim in question. The following considerations

field, 3 *Swanst.* 416; *Shepard v. Saltus*, 4 *Redf.* 232; *Livingston's Case*, 34 *N. Y.* 554; or an administrator, *Pennington v. Healey*, 1 *Cr. & Mee.* 402; *Davenport v. First Cong. Soc.*, 33 *Wis.* 387; *Boyd v. Oglesby*, 23 *Gratt.* 674; *Woolfork v. Sullivan*, 23 *Ala.* 548; *Henry County v. Taylor*, 36 *Iowa* 259; *Berry v. Parkes*, 3 *Sm. & Marsh.* 625; *Long v. Shackelford*, 25 *Miss.* 559; *Wyman's Appeal*, 13 *N. H.* 18; *People v. Pleas*, 2 *Johns. Cas.* 376; *Berrien's Estate*, 16 *Abb. Pr. (N. S.)* 23; *Alexander v. Kelso*, 3 *Bax.* 311; see *Clark v. Davis*, 32 *Mich.* 154; *De Diemar v. Van Wagenen*, 7 *Johns.* 404; *Patten's Goods*, 1 *Tuck.* 56; (but not as to the real estate, *Collins v. Carnan*, 5 *Md.* 503; *Hunt v. Thorn*, 2 *Mich.* 213; *Needham v. Belote*, 39 *Mich.* 487; see *Eagle v. Emmet*, 4 *Bradf.* 117; *Ludlow v. Cooper*, 4 *Ohio St.* 1); or the heirs, *Husband v. Epling*, 81 *Ill.* 172; *Ewing v. Handley*, 4 *Litt.* 346; or legatees, *Turner v. Campbell*, 59 *Ind.* 279; *Griffith v. Sheffield*, 1 *Eden* 73; or a creditor of the estate, *Wood v. Westall*, *Younge* 305; *Portwood v. Outon*, 3 *B. Mon.* 252; or a receiver, *Henderson v. Myers*, 11 *Phila.* 616; see *Suydam v. Receivers*, 2 *Gr. Ch.* 276; or the guardian of an infant, *King v. King*, 15 *Ill.* 187; *Edsall v. Vandemark*, 39 *Barb.* 589; *Graham v. Hester*, 15 *La. Ann.* 148; *Lippiat v. Holley*, 1 *Beav.* 423; *Schee v. McQuilken*, 59 *Ind.* 269, 276; see *Brooke v. Lord Mostyn*, 2 *De G., J. & S.* 373, 33 *Beav.* 457, 473; *Wilson v. Birchall*, *L. R.* (16 *Ch. Div.*) 41; *Walker v. Ferrin*, 4 *Vt.* 523; *Underwood v. Brockman*, 4 *Dana* 309; or its next friend, *Drake v. Fortune*, 1 *Moll.* 201; *Walker v. Walker*, 3 *Murph. (N. C.)* 265; but see *Isaacs v. Boyd*, 5 *Port.* 388; *Miles v. Kaigler*, 10 *Yerg.* 10; or assignees in bankruptcy or insolvency, *Leeming v. Lady Murray*, *L. R.* (13 *Ch. Div.*) 123; *Ex parte Magnus*, 3 *M., D. & De G.* 693; see *Bousfield v. Bousfield*, 31 *Beav.* 591, 3 *Mont. & A.* 41; *Ex parte Williams*, 1 *Mont. & A.* 689; *Burrill on As-*

Rogers v. Hand.

are apposite: The testator provides for the payment of his just debts before giving the legacies. The amount of the first-mentioned legacy (\$1,000) is less than the amount of the debt; and as to the other, a legacy of interest cannot be regarded as a satisfaction of a sum of money due absolutely from the testator to the legatee. Part of the debt was contracted after the will was made. The will was made a year and a half before the testator died. Mrs. Adams occupied the position of a servant to him. There is, in the will, no reference whatever to her service; she is not even spoken of as his housekeeper. The rule of equity that where a debtor bequeaths to his creditor a legacy *simpliciter*, equal to or exceeding the amount of his debt, and of the same nature, it is presumed, in the absence of any intimation of a contrary intention, that the legacy was meant as a satisfaction of the debt, is not a satisfactory one. It would be far more in accordance with the principles of sound construction to hold that the legacy was intended as a bounty, and not as a satisfaction of in-

signments (4th ed.) § 228; *Watkins v. Wallace*, 19 Mich. 57; or a municipal corporation, *People v. Supervisors*, 27 Cal. 656; or county commissioners, *Shanklin v. Madison Co.*, 21 Ohio St. 575.

As to the powers of executors who are directed by the will to compound debts &c., see *Ratcliffe v. Winch*, 17 Beav. 217; *In re Alexander*, 13 Irish Ch. 137.

An infant is not bound by a compromise, *Tipton v. Tipton*, 3 Jones 552; *Britton v. Williams*, 6 Munf. 453; but third persons cannot object, *Horine v. Horine*, 11 Mo. 649; see, however, *Hargrave v. Hargrave*, 12 Beav. 408.

A compromise by a trustee &c. may be allowed to stand as between him and those beneficially interested, *Forshaw v. Higginson*, 8 De G., M. & G. 827; *Bacot v. Heyward*, 5 S. C. 441; *Pool v. Dial*, 10 S. C. 440; see *Walker v. Symonds*, 3 Swanst. 2; *Alsager v. Johnson*, 4 Ves. 217, 6 Ves. 748; especially after the lapse of considerable time, *Yate v. Moseley*, 5 Ves. 480; *Manby v. Benicke*, 3 Kay & J. 342; *Villines v. Norfleet*, 2 Dev. Eq. 167; *Washburn v. Washburn*, 4 Ired. Eq. 306.

Whether creditors would also be bound by the lapse of time, see *Noell v. Robinson*, 1 Vern. 455.

In some states, express authority to compromise claims is given by statute to executors &c., *Pouce v. Wiley*, 62 Ga. 118; although such statutes have been held not to include claims against the estate, *Reitzell v. Miller*, 25 Ill. 67; *Clarke v. Hogle*, 52 Ill. 427. They do not interfere with the parties' common law right to compromise, *Chadbourn v. Chadbourn*, 9 Allen 173; *Chouteau v. Suydam*, 21 N. Y. 179; *Childs v. Updyke*, 9 Ohio St. 333.—REP.

Rogers v. Hand.

debtedness, unless there appears to be an intimation that it was intended as payment, and not as a gift. But under the rule, very slight circumstances are sufficient to repel the presumption, and there are many strong ones here. There is no substance in the claim that the demand of Mrs. Adams was satisfied by the gifts to her in the will.

The appellants further object to the allowance of the claim on the ground that they, being interested in the estate (they are residuary legatees), notified the executors that they were opposed to the payment of the claim, and they insist that the executors having settled it after such notification, without its having been previously established by suit, cannot lawfully obtain allowance for it. It appears by the record that the appellants did so object, and that one of the executors informed them that the executors did not intend to pay the claim "unless all the heirs agreed to it," and also that they had notified Mrs. Adams that she must bring suit. They did so notify her, but before the time expired within which by law she was required under the notice to bring suit, and as she was about to commence an action, they, by the advice of counsel (and on their own judgment also), compromised the claim by agreeing to pay \$3,000, without interest. There is no reason to doubt that they acted in good faith, and under the conviction that the claim would be established if it were permitted to go to suit. Nor is there anything in the case to show that they erred in judgment. There is no evidence that the claim was not an entirely just one. Opportunity was afforded in the proceedings under the exceptions, to produce evidence that the claim could not have been established, or ought not to have been paid or compromised (*Vreeland v. Vreeland*, 1 C. E. Gr. 512), but no evidence on that head was adduced. The appellants appear to have relied wholly on the fact that they objected to the payment, and that one of them, in two of his letters to one of the executors, spoke (as they allege) of evidence which could be produced in opposition to the claim. But all that is said on that score, in one of the letters, is the expression of a belief that the testator had fully compensated Mrs. Adams for her services, and a threat of the production of evidence if suit were brought,

Rogers v. Hand.

which would cause scandal; nothing is said in reference to any evidence to support a legitimate defence, or impeach the validity of the demand. What was said in the other was, that they (the appellants) were in possession of evidence which they would produce at the proper time, if necessary, which they were satisfied would have a "damaging effect" on the claim. In all this there was nothing beyond a threat of scandal, intended to operate not as a defence to the claim, but *in terrorem*, as a deterrent to prevent suit. While executors should in such cases act circumspectly, and not disregard the protest of persons interested in the estate against the payment of disputed claims, they are not bound under such a protest to refuse to pay and submit to suit, if they are satisfied that resistance will be unavailing. Where they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority, or contrary to law. They may compromise a lawsuit, may buy the peace of the estate, and extinguish even doubtful claims against it, provided they act discreetly and in good faith. *Meeker v. Vanderveer*, 3 Gr. 392. Mr. Shoemaker, one of the executors, in his testimony, says that they found no evidence of any payments to Mrs. Adams, nor anything which referred to any payments whatever to her; that the executor made inquiries as to whether she could sustain her claim before they settled it, and that after those inquiries they came to the conclusion that if they paid the claim under the compromise it would cost the estate less than to stand a lawsuit. Mr. Hand, the other executor, says that after he had given the notice to Mrs. Adams to bring suit, he made fuller inquiry into the claim, and the relations between her and the testator. He also says that he found no evidence of any payment to her for her services as housekeeper for any part of the long period of time that she had lived with him, and that he had heard she had a claim before it was presented to the executors. He further says that he was "under the impression that the executors had a right, in their discretion, to pay a just claim whether the heirs said so or not, and hence he did not particularly inquire of them about the claim or the other claims." The case of *Ritter's Appeal*, 23 Pa. St. 95, was much relied upon by the appellant's

Rogers v. Hand.

counsel as holding that an executor who pays a claim against the estate, after notice from any person interested in the estate that such person desires that it be defended, and be not paid until after judgment, will not be allowed the claim in his account if he pays it without judgment. Of course that case is not authority here. It will be found, however, that it does not declare the doctrine imputed. It merely holds that where an executor or administrator pays a claim against an estate to which there may be a valid defence, and those interested, adversely, have stood by and permitted him to do so without notice to him of their wish that he should defend it, they cannot be heard to object to the allowance of the claim in his account. There the defence, which the appellants insisted that the administrator should have made, was the bar of the statute of limitations. As already remarked, there is no evidence that the claim in controversy here was not a just debt. On the contrary, the reasonable conclusion would be, from the admitted fact of the rendition of the services by the claimant and the want of any evidence of payment, that the claim was just and ought to have been paid.

Now, as to the commissions. The account, although it purports by its express terms not to be final, is nevertheless final as to all the matters contained therein. The receipts amount to \$289,621.21½, and the disbursements, including commissions, to \$224,695.67, leaving a balance of \$64,925.54 to be disposed of according to the will. Of the receipts, about \$61,000 were from government bonds and interest thereon, about \$75,000 cash inventoried, and about \$30,000 from good stocks and dividends thereon, and railroad bonds and interest—in all, about \$169,000. The whole amount of receipts was, as above stated, \$289,621.21½. The balance over the \$166,531.05 was from bonds and mortgages, promissory notes, sales of personal property, sales of land &c. &c. The whole time occupied in the transaction of the business was about one year. About \$20,000 in mortgages were transferred to residuary legatees on account of their legacies. The allowance of three and a half per cent. does not appear to me to be excessive. The executors have had charge of a large amount of money; have been compelled to bring and conduct

Rogers v. Hand.

suits; have been compelled to make investigations so as to ascertain what land, exactly, the testator owned, and have had to sell land under the power given to them by the will &c. &c. For their pains, trouble and risk in the matter, I think the allowance made by the orphans court reasonable and proper.

The decree will be affirmed, with costs.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
NOVEMBER TERM, 1884.

GEORGE HARRAL et al., appellants,

v.

CLAIRE HARRAL, respondent.

1. Under the laws of France, by a marriage without a contract as to property, a community of property between the husband and wife is established as an incident of the marriage. During coverture the husband has the control and management of the community property, and he may dispose of his share of the common property by his will; but the wife's share—that is, the one-half of the community property—the husband cannot dispose of, and she will be entitled to it on his death.

2. A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicile is not necessary.

3. To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added *animus manendi*; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of mak-

Harral v. Harral.

ing it his home, unless, or until something uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home.

4. By the laws of France, the marriage of a foreigner in France without any contract as to property, followed by the establishment of a conjugal domicile in that country, will subject the property of the married persons to the community law, and a government authorization under article XIII. of the Code is not necessary to the establishment of such a domicile.

5. H., whose birthplace was in Connecticut, went to Europe in 1869, for the purpose of acquiring the German language, and completing his professional studies. In 1872 he went to Paris, where he remained; and, in February, 1877, married a French woman in Paris, without any contract as to property. Immediately after the marriage he rented a house at Suresnes, a village near Paris, for two years, and took up his residence there with his wife. In May, 1878, he was brought to this country, and sent to a hospital for the insane, at Philadelphia, where he died in 1881.—*Held*, that by his marriage in France, and the establishment of his conjugal domicile there, his personal property became subject to the community law, and that his widow, on his death, was entitled to the one-half part thereof, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others.

On appeal from a decree of the chancellor, whose opinion is reported in *Harrall v. Wallis*, 10 *Stew. Eq.* 458.

Frederick F. Harral was born in Connecticut in 1842. He graduated at Yale College in 1863, and at the College of Physician and Surgeons, in New York city, in 1868. He was married on the 20th of February, 1877, before the deputy mayor, in the city of Paris, to Clarice Marie Le Gars, a French woman. In May, 1878, he returned to this country, and died at Kirkbride's hospital for the insane, in Philadelphia, July 5th, 1881.

On the 9th of July, 1869, and before his departure for Europe, the decedent duly made and executed a will, devising and bequeathing all his property, real and personal, to his brother and sisters, and appointing William Creighton Peet and Hamilton Wallis executors. This will was admitted to probate in the prerogative court of this state on the 31st of July, 1882.

The widow filed this bill in the court of chancery of this state, to which the legatees under the will of her husband and the executors are parties.

The prayer of the bill is that the personal estate of the de-

Harral v. Harral.

cedent, so far as concerns the complainant's interest therein, should be distributed in accordance with the laws of France.

On final hearing, on bill answer and depositions, the chancellor made a decree in accordance with the prayer of the bill. From that decree the defendants appealed.

Mr. Flavel McGee and *Mr. J. D. Bedle*, for appellants.

Mr. John Linn and *Mr. F. R. Coudert*, of New York, for respondents.

The opinion of the court was delivered by

DEPUE, J.

The law of France in relation to the rights of husband and wife in the property of either spouse is established by the Code Napoleon. Before the French Revolution, the northern provinces of France were under the customary law, and the community of property governed the nuptial contract; in the southern provinces the Roman law prevailed, and the contract was governed by the dotal system. The Code Napoleon left the parties to elect the law by which the marriage should be governed; and if no election was made, the community system was to prevail. 2 *Kent* 187, note. Section 1391 of the Code provides that the parties may declare in a general manner that they intend to marry either under the law of community or under the law of dowry. The community is either legal or conventional. Legal community is established either by a simple declaration that the parties marry under the law of community, or by a marriage without any contract on the subject. Sections 1400, 1497. There was no marriage contract between these parties with respect to property; and if disposition of the personal estate in question is to be made by the French law, it must be disposed of as community property.

Community is divided by the Code into two classes—active and passive. The former relates to the disposition of property; the latter, to liability for debts. The property which is comprised

Harral v. Harral.

in the community consists of (1) All the movable property which the married parties possessed on the day of the celebration of the marriage, and all movable property which falls to them during the marriage, by succession, or even by donation, if the donor has not expressed himself to the contrary; (2) All the fruits, revenues, interest and arrears of what nature soever they may be, fallen due or received during the marriage, and arising from property which belonged to the married persons at the time of the celebration of the marriage, or from such as has fallen to them during the marriage by any title whatsoever; and (3) All immovable property acquired during the marriage. Section 1401. This community, whether it be conventional or legal, commences from the day of the marriage contracted before the officer of the civil power. Section 1399. During the coverture the husband has the custody, control, management and power of disposition (under some restrictions) of the community property, (sections 1421, 1422); and he may make a testamentary disposition of his portion of the community property, but of no more. Section 1423. After the death of the husband the wife may accept or renounce the community. Section 1453. If she accept it, her share—that is, the one-half part of the community property—is given to her, subject, in the partition, to certain specified deductions and allowances by way of compensation. Sections 1467, 1480.

The complainant, in her bill, charges that the legal domicile of the decedent, at the time of his death, was in France, and insists that from the time of the celebration of her marriage with the testator, by force and operation of the laws of France, a legal community was established between her and her husband as to all the personal or movable property possessed or owned by either of them during the marriage, and in all the fruits, revenues, interest and income thereof; and that upon the death of the testator she was entitled to have and receive, absolutely, for her own use and benefit, the one-half part of all such property so held in community between herself and her husband, and that it was not in the power of her husband to dispose of that share or interest in said property, which, by the laws of France, belonged to her.

Harral v. Harral.

The defendants, in their answer, admit that the testator was married to the complainant on the 20th of February, 1877, at Paris; but they say that the marriage was void for the reason that the testator at that time was of non-sane mind, and incompetent to enter into a contract of marriage. They admit that the testator lived in Paris for five years before his marriage, but deny that his legal domicile was, at the time of his marriage, or at any time, in France, and insist that distribution of his personal estate should be made under the laws of New Jersey. They also say that by the law of France no man can become domiciled in France without he shall have first applied to the French government for permission to do so, and obtained an express authorization from the government to establish such domicile, and that the testator never obtained an authorization to establish his domicile in France, and never became domiciled there by the laws of that country.

The chancellor, in his opinion, considered the evidence on the subject of the testator's mental condition at the time of his marriage, and reached the conclusion that the testator was not at that time mentally incapacitated to contract marriage or to change or establish his domicile. The evidence shows that the decedent, for some time, had been addicted to intemperance, and that his physical and mental vigor had been impaired by indulgence in drink; but it falls short of proof that, at the time of his marriage, his mental faculties had become so impaired as to incapacitate him from entering into a contract of marriage, or from deciding upon the place of his domicile. The answer contains no allegation of fraud or imposition upon the decedent in procuring the marriage. The case turns wholly upon the applicability of the community law to the testator's personal estate in the hands of his executors.

When the testator went abroad in 1869, his property consisted of personal estate, and a house and lot in Bridgeport, Connecticut. The personal estate he left in charge of Mr. Wallis, to be invested and cared for, and it remained in charge of the latter during the lifetime of the decedent. This personal estate, amounting to about \$50,000, at the testator's death came to the

Harral v. Harral.

hands of the executors. This controversy relates wholly to the personal estate.

The domicile of the testator's parents, at the time of his birth, was in Bridgeport, Connecticut. That was his domicile of origin. His father died in 1862. In 1865 the family residence in Bridgeport was sold, and in 1866 his mother removed to New York with all the family, except one son, who was married, and had his household in Bridgeport. The mother rented a house in New York as a residence for herself and the family, which they occupied until her death in December, 1867. After his mother's death, the testator resided in New York city with his brother, until he was appointed house-surgeon in the New York Hospital, and had his residence in the hospital until he went to Europe in August, 1869.

The decedent went abroad for the purpose of acquiring the German language, and continuing his professional studies. In 1869 he was in Paris temporarily, and in the fall of that year left Paris for Germany, where he remained about two years. He then went to Paris again, and resided there in No. 8 Rue de la Sarbonne, known as the Latin Quartier. In 1872, he became acquainted with the complainant, who lived with him as his mistress at No. 8 Rue de la Sarbonne, until they were married on the 20th of February, 1877. Immediately after their marriage they began housekeeping in a house rented by him at Suresnes, a village a short distance from Paris. He had a lease of the house for two years, and he and his wife continued to occupy it until his return to America, in May, 1878. He seems to have been attached to his wife. In May, 1877, he wrote to Mr. Wallis, announcing his marriage, and said he was "happy and contented." The facts connected with the residence of the decedent at Suresnes are fully stated in the opinion of the chancellor, and need not be repeated here. The chancellor, from the testimony, concluded that the decedent had settled himself in France to live there, and make it his home. The circumstances under which he was brought to America are also detailed in the chancellor's opinion. They show no intention on the part

Harral v. Harral.

of the decedent to make any change, at that time, in his domicile. The evidence is quite to the contrary.

A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicile is not essential. He need not do all that is necessary to divest himself of his original nationality. There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added the *animus manendi*; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Haldane v. Eckford*, L. R. (8 Eq.) 631; *King v. Foxwell*, L. R. (3 Ch. Div.) 518; *Lord v. Colvin*, 5 Jur. (N. S.) 351; *Aikman v. Aikman*, 7 Id. 1017, 1019; *Douglas v. Douglas*, L. R. (12 Eq.) 617, 644; *Udny v. Udny*, L. R. (1 Sc. App.) 441; *Cadwalader v. Howell*, 3 Harr. 144, 145.

We think the evidence proves that the testator's domicile, arising from the *factum* of residence and the *animus manendi*, was, at the time of his death, by the *jus gentium*, in France.

But it is contended that, inasmuch as the decedent never obtained an authorization from the French government, he was incapable, by the law of that country, of acquiring a domicile in France, and that therefore his domicile of origin, or his domicile before he took up his residence in France, either revived or, by the French law, would govern in the disposition of his personal estate if it was administered upon in France. Article XIII of the Code Napoleon is relied on to sustain this contention. That article is in these words:

"The foreigner who shall have been admitted by the government to establish his domicile in France, shall enjoy in that country all civil rights so long as he shall continue to reside there."

It appears from the evidence that the authorization contemplated by this article of the Code, is obtained by an application

Harral v. Harral.

to the head of the government, and is attended with formalities almost as solemn as those required for naturalization in France.

The construction of this article was before the English courts in *Bremer v. Freeman*, 10 Moore P. C. 306, and *Hamilton v. Dallas*, L. R. (1 Ch. Div.) 257, and was somewhat considered in the New York court of appeals in *Dupuy v. Wurtz*, 53 N. Y. 556. In *Bremer v. Freeman*, it was held that, if by the *jus gentium* the decedent, who was an English woman by birth, was *de facto* domiciled in France, the authorization of the French government was not necessary to confer upon her the right of testacy, and that her will, not executed in conformity with the French law, was invalid. In *Hamilton v. Dallas*, Vice-Chancellor Bacon held that a *de facto* domicile, governing the succession of the personal estate of a decedent, might be acquired by a foreigner resident in that country, who had not obtained the government authorization required by article XIII of the French Code, as the condition for the enjoyment by a foreigner resident in that country of full civil rights. The learned judge who prepared the opinion in *Dupuy v. Wurtz*, expressed a contrary opinion, but the case did not call for a decision on that point. The counsel of the defendants have produced several decisions of the French courts, which hold that, in cases of intestacy, the inheritance of a foreigner domiciled *de facto* in France will not be distributed under the French law, unless he shall have obtained the authorization required by article XIII of the Code. *Pepin's Case*, decided in 1868; *Melizet's Case*, decided January, 1869; *Ott's Case*, decided January, 1869; *Forgo's Case*, decided in 1875, and *Cuirana's Case*, decided in 1881. It will be observed that all these cases relate to the transmission of property by inheritance, or by testamentary disposition. They do not touch the question in controversy in this case. The complainant does not claim the property in dispute by any right of succession, nor does she dispute the validity of the testator's will, as not being executed according to the laws of France. The claim she makes to the one-half of the personal property of her deceased husband, she founds upon the marriage in France, and the incidents of the married relation, in virtue of which she claims that, by the

Harral v. Harral.

French law, she became thereby *ipso facto* entitled to that share in his movable property.

The French jurists recognize a distinction between such a legal domicile as a foreigner can acquire by fulfilling the requirements of article XIII of the Code, and will entitle him to all the civil rights of native-born Frenchmen, and a domicile, in fact, which is acquired by a residence without compliance with any legal formalities. The right of a foreigner to contract a lawful marriage is not made to depend on the observance of such forms as are necessary to the acquisition of citizenship; it is given on the sole condition of six months' residence by either of the parties. Article LXXIV of the Code provides that "the marriage shall be celebrated in the commune in which the one or the other of the parties shall be domiciled," and declares that "this domicile shall be established by six months' continued habitation within the same commune." These conditions were fulfilled, and the marriage was lawfully celebrated under the French law.

The complainant's counsel contended that inasmuch as the marriage was celebrated in France, the wife, immediately on her consummation of the marriage, acquired a vested right in her husband's property, independent of any question of domicile, and that her right in the personal property of the husband was a *jus* acquired by the marriage by virtue of the French law, which could not be invalidated by any extraneous circumstances. This view has had some support in the opinions of writers on international law, but is contrary to the course of decision in the courts of this country, and, I may add, to the later decisions of the courts elsewhere. The doctrine generally adopted and supported by reason and public policy is, that a marriage celebrated according to rites and ceremonies recognized by the laws of the country where the marriage takes place, is valid everywhere; and, as a general rule (not without exceptions), by that law the capacity of the parties to contract a marriage is determined. *Whart. on Confl. of Laws* §§ 161, 162, 164; *Story on Confl. of Laws* §§ 113, 113 a, 114, 123 b, 124, 124 a; *Bish. on Marr. and Div.* §§ 357, 359, 363, 370; *Moore v. Hegeman*, 92 N. Y. 521. But with respect to the property rights of husband or wife in the

Harral v. Harral.

personal property of either, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights depend on what is known in law as the matrimonial domicile. *Le Breton v. Nouchet*, 3 Mart. (La.) 60, 81; *Ford v. Ford*, 2 Mart. (N. S.) 574; *Allen v. Allen*, 6 Rob. (La.) 104; *Kneeland v. Ensley*, Meigs (Tenn.) 620; *Glenn v. Glenn*, 47 Ala. 204; *Mason v. Homer*, 105 Mass. 116; *Story on Confl. of Laws* §§ 186, 193; 2 Pars. on Cont. 590. Mr. Wharton says that the place of the celebration is not necessarily the place of the performance of the marriage, which, he says, the later jurists have agreed is its true legal site, and that this place of performance is the matrimonial domicile to which the husband and wife propose to repair. *Whart. on Confl. of Laws* § 192. On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the law of his domicile; but that presumption is overcome, and the legal inference is superseded when, on the marriage, the parties adopt a place for their matrimonial domicile—in which event the matrimonial domicile will control, and will regulate the property rights of the parties in movables.

The authorities are quite generally in accord in selecting the matrimonial domicile as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either, which was *in esse* when the marriage took place. Perplexing questions sometimes arise as to what place shall be deemed the true matrimonial domicile in the sense of this rule. Mr. Justice Story supposes a case where neither of the parties has a domicile in the place where the marriage was celebrated, and the parties were there *in transitu*, or during a temporary residence, or on a journey made for that sole purpose *animo revertendi*, and says that the principle maintained by foreign jurists in such cases would be that the actual or intended domicile of the parties would be deemed to be the true matrimonial domicile; or, to express the doctrine in a more general form, that the law of the place where, at the time of the marriage, the parties intended to fix their domicile would govern all the rights resulting from the marriage. He also supposes the case of a man domiciled in one state marrying a lady domiciled in another

Harral v. Harral.

state, and says that foreign jurists would hold that the matrimonial domicile would be the domicile of the husband if it was the intention of the parties to fix their residence there, or the domicile of the wife if it was their intention to fix their residence there, or in a different place from the domicile of either the husband or wife if they intended to establish their matrimonial domicile in some other place. He then refers to the decisions of the courts of Louisiana, adopting the same principle, and concludes that, "under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm that a contrary doctrine will scarcely hereafter be established; for, in England as well as in America, in the interpretation of other contracts, the laws of the place where they are to be performed has been held to govern. Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated), there is the rule of analogy to govern it; and treated as a matter to be governed by the municipal law to which the parties were, or meant to be, subjected by their future domicile, the doctrine seems equally capable of a solid vindication." *Story's Confl. of Laws* §§ 191-199. All perplexity on this subject is removed where, as in this case, the place where the marriage is celebrated, the domicile of the wife, and the establishment of a home after the marriage, concur. The place of contract and the place of performance being the same, on legal analogies there would seem to be no doubt that that place would be the matrimonial domicile, and that the incidents of the marriage would be determined by the law of that place.

Nor can that question, which has given rise to great diversity of opinion where new property has been acquired after the marriage, and in a new domicile, arise in this case, for the property to which this controversy relates was *in esse* at the time of the marriage, and the matrimonial domicile then established continued until the husband's death; and it is universally allowed that, when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property

Harral v. Harral.

are to be regulated by the law of the matrimonial domicile, so long as that remains unchanged. *Westlake's Int. Law* § 366.

The French law recognizes a conjugal domicile analogous to what is known in our law as a matrimonial domicile, and is distinguished from that domicile which is required for the purpose of contracting a lawful marriage; and the law of that country, with respect to the effect of the conjugal domicile upon the rights of husband and wife in the movable property of either spouse, is in accordance with the views above expressed. George Merrell, a witness called by the defendants, who is not an attorney or *avocat* in the French courts, being a foreigner who studied law in New York city, said that a foreigner cannot acquire a domicile in France without complying with article XIII of the Code, except it be a matrimonial domicile, which he defines to be the residence necessary to confer jurisdiction on the magistrate for the celebration of the marriage; and that in the case of an American citizen establishing his residence in France, with intention of making that his permanent home, marrying and living there, not having received the government authorization, according to the Code, his personal property would be distributed according to the American law. On the other hand, M. Goiraud, a French lawyer called by the complainant, testified that the domicile necessary for a foreigner to contract a legal marriage required only a residence, in fact, for six months, and that the domicile which was to govern the marriage relations of the parties would be the conjugal domicile, which he defined to be the domicile which had been chosen by the parties, either at the time of the marriage or after the marriage, in order to be finally settled. M. Clunet, *avocat* of the court of Paris, called by the complainant, testified that French jurisprudence, in order to establish the marriage relation of the parties married without a contract, takes, as a principle, their supposed intention, and finds the expression of that intention in what is called the conjugal domicile, or, in other words, the place where, after the marriage, the parties establish themselves. Both these witnesses agree that government authorization is not required for the establishment of a conjugal domicile in France, which, when the marriage is celebrated in

Harral v. Harral.

France without a contract, will make the property of a foreign-born husband subject to the community law.

The decisions of the French courts sustain the opinions given by M. Goiraud and M. Clunet. In *Breul's Case*, *Sirey* (1854,) 2-105, translated in 4 *Phillim. Int. Law* 226, and more fully in *Cole on Domicile* 45, 47, Breul was a Hanoverian; he married a French woman in France, and died there; at the time of his marriage, and at his death, he was domiciled in France, but had not obtained a governmental authorization for that purpose. On appeal, the question was whether there was a community of goods between husband and wife. The court held that there was, and that foreigners were capable of entering into all contracts depending on the law of nations, and could, when they marry in France, accept tacitly the rule of community, established by law, in the same way as they might have made that rule the subject of express stipulation in a formal contract; that, to make this principle apply to foreigners, it was not enough that the marriage was celebrated in France; but that it was also necessary that the intention of the contracting parties to adopt the community should be manifested by affirmative acts; that the establishment of a domicile in France had always been regarded as the most positive manifestation of such intention; that the domicile ought to have an importance to distinguish it from simple residence, but it was not necessary that it should have been authorized by the government under article XIII, for the reason that the object of this authorization was to confer on the foreigner all the civil rights of native-born Frenchmen, and that these rights were not necessary in a foreigner in order to enable him to enter into matrimonial conventions, which are purely of the *jus gentium*.

In *Lloyd v. Lloyd*, *Sirey* (1849,) 2-220; in *Cole on Domicile* 37, and translated in a note to *Whicker v. Hume*, 13 *Beav.* 401, James Lloyd, a foreigner, whose birthplace was unknown, and who was, by presumption and residence, an Englishman, came to France, and established himself there permanently. In 1836 he married, at Paris, a French woman, without a marriage settlement. He had three children by the wife before marriage, and three afterwards. He continued his residence, and died in Paris,

Harral v. Harral.

leaving his wife and the six children surviving him. The widow claimed, before the French court, that portion of the property which would belong to her by the French law, if she and her husband were married under the *régime* of the *communauté des biens*. Her right depended on whether, at the time of the marriage, the decedent had a legal domicile in France. He never had applied for or obtained an authorization under article XIII of the Code. The tribunal of the Seine decided against her claim, but the decree was reversed by the court of appeal, and the claim of the widow sustained. The court said that "it is fruitless to contend that the domicile of James Lloyd, in France, was not accompanied by the authorization of the government, required by article XIII, and therefore it cannot be taken into consideration as regulating the conjugal domicile, for it is a fixed principle of law, as well before as since the Code, that a foreigner, even when he preserves that quality, could acquire a domicile in France; that article XIII of the Code did not intend to change this state of things; that it is only when a foreigner wishes to possess such a domicile in France, as will confer upon him all civil rights, that the authorization of government is required; that in the present case it is not a question as to a civil right, exclusively appertaining to a French citizen; that the tacit agreement as to the community of goods, resulting from submission to articles 1393, 1399, 1340, and the succeeding articles, was purely derived from the law of nations."

In *Fraix's Case*, Fraix was a Savoyard, and settled in Paris, where he married his second wife, a French woman. The question was whether he married under the French *communauté des biens*. The court held that although he had not been authorized by the government to establish his domicile in France, a domicile was not necessary to make the *communauté* applicable, which is presumed to have been the intention of the parties when they fixed themselves in France. 4 *Phillim. Int. Law* 231.

In *Ghisla's Case*, decided in 1878, Ghisla was a Swiss by birth. He married a French woman in France, and before and after his marriage had his domicile in Marseilles, and in that place died. His widow claimed the benefit of the community law, and it was

Harral v. Harral.

adjudged to her by the court of Aix, the ground of the decision being that, where one of the married couple is French, and the other a foreigner, they are, in the absence of a contract, governed by the law of the conjugal domicile; that the intention of the parties is to be considered before their nationality, and that to the fixing of the conjugal domicile, government authorization was not required, for whatever appertains to the marriage belongs rather to the *jus gentium* than to the civil law, properly speaking. *Jour. Int. Law* 1878, 610. In *Dages v. Laborde* it was held that the legislation applicable to the civil interests of a marriage, was that of the place where the married couple established their domicile immediately after the marriage, and where it appeared that it was their intention to fix the principal place of their business, and to raise their family, and that this domicile was denominated their matrimonial domicile. Court of Pau, 1835, affirmed in the court of cassation, December, 1836, 28 *Annual des Palais* 537.

Giovanetti v. Orsini, *Sirey* (1855,) 699, is the converse of the cases cited. In that case a Frenchman, while domiciled in Tuscany, married an Italian woman in Florence. They afterwards removed to France. On her death, the question arose in France as to the matrimonial *régime* governing the estate of the deceased wife. There had been an agreement, subsequent to marriage, with respect to property, not valid under the French law. The court held that the marriage having been contracted at Florence, and the parties having, at the epoch of their marriage, fixed their matrimonial domicile in Tuscany, the marriage was necessarily under the influence of the Roman law, which governed such matters in Tuscany, according to which, agreements subsequent to marriage were authorized and valid. *Cole on Domicile* 41.

Morand v. Commune de Mézère, *Sirey* (1873,) pt. II., 148, much relied on by the defendants, is not in point. The parties were married in Sardinia, and then removed to France. The husband settled in Paris, and had his principal establishment there, but did not obtain authorization from the government. His daughter was born in France. He died in 1855, and his

Titus v. Hoagland.

widow in 1867, making the commune her residuary legatee. The court held that Morand was a foreigner, and so were his wife and daughter, and therefore the laws of France did not govern the succession. The effect of a French marriage, followed by a conjugal domicile in France, was in nowise involved.

I think it is clearly shown, not only by the testimony of the French lawyers who were witnesses in this case, but also by the French decisions, that it is the law of that country that the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law, and that a government authorization under article XIII of the Code is not necessary to the establishment of such a domicile.

The decree of the chancellor should be affirmed.

Decree unanimously affirmed.

HARMON H. TITUS et ux. et al., appellants,

v.

CHRISTOPHER S. HOAGLAND, executor of Jane V. Titus,
deceased, respondent.

1. A son advanced money to his mother for her support during her life, under an agreement that he should be repaid at her death out of her estate. The son procured from his wife the money advanced, agreeing that she should have the account against his mother. Equity will enforce the claim in behalf of the wife.

2. The parol assignment to the wife being unknown to the mother, a counterclaim which she had against her son at her death will be set off against this claim of the wife.

3. Where application is made under section 20 of the act relative to the sale of land (*Rev. p. 1047*) for a sum sufficient to pay debts, the amount requisite for the purpose will, as a general rule, be paid to the personal representative, to be administered in the orphans court. There must be special circumstances to warrant the chancellor to take the settlement of the account out of the orphans court.

Titus v. Hoagland.

On appeal from part of a decree advised by Vice-Chancellor Van Fleet.

Mr. John D. Bartine and *Mr. Gilbert Collins*, for appellants.

Mr. John R. Emery, for respondent.

The opinion of the court was delivered by

VAN SYCKEL, J.

Christopher S. Hoagland, the complainant, and Harmon H. Titus, one of the defendants, are the executors of the last will and testament of Jane V. Titus, deceased. Since the death of said testatrix her real estate has been sold under a decree of the court of chancery, and the proceeds of such sale paid to the clerk of said court. Thereupon the said Harmon H. Titus as executor filed his petition in the court of chancery, setting up that the personal estate of the decedent was insufficient to pay her debts, and praying that out of the moneys arising from the sale of said lands a sum sufficient to satisfy such debts should be paid to him for that purpose.

The claim which is the foundation of the only controversy in this court, is one alleged to be due from the testatrix to Lydia D. Titus by parol assignment from her husband, the said Harmon.

The bill is filed by the co-executor, setting up that this claim made by the said Lydia is fraudulent, and praying that an account may be taken under the direction of the court of chancery; that the claims against the estate may be there ascertained and established, and the surplus, if any, distributed pursuant to the will in that jurisdiction. At the time of her death the testatrix owned a farm in Somerset county, containing sixty acres of land, on which she had lived for more than twenty-five years. Her family, during the greater portion of that period, consisted of herself, two sons, two daughters and two grandchildren. The debt in question was contracted between 1864 and the death of the testatrix (which occurred in 1877) for goods alleged to have been furnished and money loaned to her by her son, the said

Titus v. Hoagland.

Harmon H. Titus, out of his wife's private separate estate, under an agreement between said husband and wife that the said claim against the mother should belong to the wife.

Harmon H. Titus, in support of the claim, has produced checks for all the cash items except two, drawn by him to the order of his mother, and by her endorsed; also receipted bills for various items in the account, and pass-books kept during the entire time, containing the several items now claimed. He testifies that the claim is in all respects a just one. Jane Van Middlesworth, his sister, whose interest is adverse to the allowance of this demand, testifies that she has known of the existence of this account for a long time, and that at various times she and her brothers had, at their mother's request, written to Harmon for money and goods, which were subsequently received in response to such letters. She further states that the testatrix, within three weeks of her death, in the presence of the several members of the family, said to Harmon that he had ruined himself to keep a roof over her head; that he should be paid if it took the last cent she had, and then proposed to give him a mortgage on her farm. In this testimony she is corroborated by her husband. Randolph Titus, a hostile witness, admits that various articles charged in the account were furnished by Harmon, and that he took some of the checks to the bank, and received the money for them for testatrix.

He also admits that at the conversation which occurred about three weeks before his mother's death, he told his mother she ought to settle with Harmon and secure his claim. He qualifies his testimony by saying that Harmon stated that his only claim was for the hovel and machine-house erected on the farm, but in this respect he is contradicted by Ridgeway Hoagland, whose interest also is adverse to that of the claimant.

Ridgeway says that he lived with testatrix; that goods frequently came there from his uncle Harmon; that he was present at the conversation referred to by Randolph Titus; that the testatrix asked Harmon if he had his bill, and he wanted to know why she asked for it; she said she wanted to give him a first mortgage on the farm; that Randolph said she should not give

Hoagland v. Titus.

him a first mortgage; that Harmon said it would take half the farm, and the testatrix replied, "Well, then I will live accordingly."

The evidence of the members of the family is very persuasive to show that the products of the farm were insufficient to support the testatrix and her large family, and that she was generously assisted by her son Harmon to the extent claimed, under an agreement that he should be paid out of her estate at her death.

Nor do I find any reason to doubt the testimony of Harmon and his wife, Lydia, that the latter promised him, out of her own earnings, the sum of \$2,250, which enabled him to provide for his mother, with the understanding that the wife was to have his claim against his mother at the death of the latter.

The recognition of the claim by the testatrix shortly before her death, and the fact that it was not to be enforced during her lifetime, makes it unnecessary to consider the question of limitation.

That part of the account which accrued prior to 1861, amounting to \$167.61, passed to Harmon's assignee in bankruptcy, and must be excluded. He had no power to transfer that portion of the claim to Lydia, to whom he was married in 1861.

There is also an admitted overcharge of \$18.05 in the account, which must be corrected. Lydia admits that the testatrix had no knowledge, in her lifetime, of the equitable assignment of this claim to her, and therefore any counter-claim which the testatrix had at her decease against Harmon is to be set off against it. The proofs disclose the fact that the testatrix was the guardian of Ridgeway Hoagland, and that the sum of \$1,500 in her hands as such guardian was loaned by her in 1874 to Harmon H. Titus. Although this loan was made from the trust fund, the testatrix, by her will executed with the consent of Harmon, provided for the payment of the sum due the ward, intending thereby, it must be presumed, to make the claim against Harmon due to her in her individual capacity. It cannot be supposed that in her dealings with Harmon the testatrix expected to pay his entire claim against her without any allowance for this sum of \$1,500 advanced to him. It will be inequitable to permit the entire claim of Harmon, who is insolvent, to be recovered from

Hoagland v. Titus.

the estate of the decedent, leaving the sum advanced to him by the mother, and for which her estate is liable, wholly unpaid. This sum should be credited on the claim, and the balance allowed.

The decree below should be reversed, and the record remitted, that an account may be taken and a decree made in accordance with the views herein expressed.

As a general rule, where application is made, as in this case, under section 20 of the act relative to the sale of land (*Rev. p. 1047*), for a sufficient sum arising from the sale thereof to pay debts, the amount requisite for such purpose will be paid to the personal representative, to be administered under the direction of the orphans court. Such has been the practice under rule 154 of the court of chancery.

There must be special circumstances to warrant the chancellor to take the settlement of the account of executors or administrators out of the orphans court.

In *Salter v. Williamson*, 1 Gr. Ch. 480, the chancellor held that where there are no special reasons for going into equity, the orphans court is the proper tribunal for the settlement of such accounts.

Chancellor Williamson recognized the propriety of this rule in *Clarke v. Johnston*, 2 Stock. 287, and it has not since then been questioned. In the case before us the wife could not sue the husband at law for her claim, and therefore that full disposition may be made of the case, it is indispensable that the chancellor retain control of it for the purpose of final settlement and distribution.

This disposition of the case will enable the chancellor to permit Ridgeway Hoagland, if he is so advised, to make application for the appropriation of the \$1,500 set off to the payment of the sum due said Ridgeway from his deceased guardian. It is manifest that the provision made in the will of the testatrix for satisfying the claim of her ward is wholly inadequate for the purpose. The will declares that she owes her ward \$1,500, and, in discharge of such indebtedness, provides that he shall have so much of the share she would otherwise have given to Harmon H. Titus as

Wharton v. Stoutenburgh.

will be sufficient to pay it. Full and complete justice will be done by applying the \$1,500 to the payment of this trust liability on terms that it shall operate as an equitable assignment of Ridgeway's share under the will to Lydia D. Titus.

The bill is not framed to permit this court to make such decree.

Decree unanimously reversed.

JOSEPH WHARTON, appellant,

v.

LUKE I. STOUTENBURGH, respondent,

1. When, on decree for specific performance, the defendant is in contempt for refusal to perform, the court may give it effect by establishing the contract as if it had been executed; and by enjoining and restraining the defendant from denying its execution and delivery; and from defending himself in any action by denying its execution.

2. Such substituted decree, made while the defendant is in contempt, may be without notice, but he has the right of appeal therefrom.

Mr. P. L. Voorhees and Mr. J. G. Shipman, for appellant.

Mr. J. E. Stoutenburgh and Mr. H. C. Pitney, for respondent.

On bill to enforce the specific performance of a contract to execute a mining lease, argued before Vice-Chancellor Dodd. A decree was made that the agreement be executed. A copy of the decree was served on the solicitor of the defendant, November 2d, 1881, and at the same time there was a notice served on said solicitor, calling on the defendant to appear at the vice-chancellor's chambers, in Newark, on November 14th, 1881, to sign, seal, execute and deliver the said articles of agreement.

Wharton v. Stoutenburgh.

At the time and place designated, both parties appeared by their respective solicitors, and the solicitor of the defendant represented that an appeal had been taken from the decree to the court of errors and appeals. An order was thereupon made that no further proceedings should be had under said notice pending the appeal. The court of errors and appeals having in all things affirmed the decree, notice was given again for the defendant to appear before the vice-chancellor, on July 24th, 1882, to execute and deliver the lease in accordance with the decree. At the time and place named in the notice, the complainant and his solicitor attended for the purpose of executing the agreement; but the defendant failed and refused to attend, in contempt of the decree of the court. Whereupon, it was decreed by the chancellor, on August 4th, 1882, "that the said Joseph Wharton, the defendant, is bound by all and singular the covenants, clauses, provisos and conditions whatsoever, mentioned and contained in the above-named articles of agreement of lease; and that at all times, and in all places whatsoever, and in all the courts of this state and elsewhere, and for all purposes whatsoever, the above-mentioned articles of agreement shall be taken, considered, recognized, construed and enforced in the same manner, and to the same extent, and with like effect in every respect and particular, as if they were and had been actually signed, sealed, executed and acknowledged by the said defendant, Joseph Wharton, and the said complainant, respectively. And the said defendant, Joseph Wharton, is hereby perpetually enjoined and restrained from ever, at any time, or under any circumstances, or for any purpose, denying that he has duly signed, sealed and delivered the same, and from defending himself in any action in any court of law hereafter to be brought against him therein, on the ground that the said articles of agreement of lease have not been actually signed, sealed and delivered by him."

From this decree an appeal has also been taken.

The facts of the case appear in the opinions delivered in each court, and reported in *Wharton v. Stoutenburgh*, 8 *Stew. Eq.* 266.

Wharton v. Stoutenburgh.

The opinion of the court was delivered by

SCUDDER, J.

Beyond the recital in this last decree that the defendant is in contempt of the decree of that court, there have been no proceedings to adjudge him guilty of such contempt and punish him for it. The reason for such forbearance is that he is not a resident of this state so that he may be attached by his body; nor has he any property within the reach of the process of the court that may be sequestered.

The complainant is the owner of the leased land in Morris county, and the defendant, who agreed to lease it, resides in the state of Pennsylvania. The only relief which could be given by the court was therefore a substituted decree or order supplementing the former decree, with such relief as it was designed to give, which had been frustrated by the contumacy of the defendant in refusing to attend and execute the lease, and keeping beyond the reach of the court. Direct relief being made ineffective by his act, indirect relief was afforded, first by establishing the lease as if it had been executed, and next by enjoining and restraining him from denying its execution and delivery, and from defending himself in any action to be brought against him by denying its due execution. The former part of this substituted decree may well be justified by the general maxim that equity looks upon that as done which ought to have been done, which means that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. *1 Story's Eq. § 64 g.* Having ascertained the agreement between the parties exactly as it should have been executed when the defendant refused to obey its decree, the court ordered that though, in fact, it is not done, yet in effect and in good conscience it shall be regarded as executed by the parties as it was originally intended. This is the specific relief that it is in the power of the court to give, under the circumstances, and accords with the former decree for the formal execution of the lease.

The latter part of the decree, enjoining and restraining the

Wharton v. Stoutenburgh.

defendant from denying its execution in any court of law, is a corollary to the former part, by which equitable control is taken for its enforcement, and it is within the restraining power of a court of equity, which will give effect to its decrees when the attempt is made to interfere with them in any court of co-ordinate jurisdiction.

The objection that the decree complained of was made without notice to the defendant is not maintainable. He was in contempt of the court, and voluntarily beyond its jurisdiction. Notice given to him to appear and execute its decree had been disregarded. Why should the court further seek him, when, by orderly, equitable methods, it was executing its own decree and giving the complainant the relief to which he had been shown, in the judgment of the court, to be entitled? It was not a new proceeding, but followed the former decree as consequently as process of execution in the ordinary course of procedure in a suit in equity, without showing special cause other than appeared in the case. Its decree had been contemned, and of its own motion, without notice, it could enforce it, within its equitable power, by subsequent proceedings in the nature of equivalent and substituted relief. If a court has power, when and while a defendant in an equity action is in contempt for disobeying its order, to refuse to hear him, as was held in *Walker v. Walker*, 82 N. Y. 260; *Brinkley v. Brinkley*, 47 N. Y. 40, and in many other cases, it will not require notice to be served on him to appear and be heard when it is proceeding regularly to enforce its decree against him.

The court refused to dismiss the appeal, because the decree was final, affecting the defendant's substantial right, and by which he was "aggrieved" within the meaning of the statute; but having heard the appeal, we are satisfied that the decree is right and should be affirmed.

Decree unanimously affirmed.

Larison v. Polhemus.

ACHSAH A. LARISON et al., appellants,

v.

SARAH POLHEMUS et al., respondents.

1. It appearing that two sons had worked their father's farms, under an agreement that they should do so until they had accumulated for him a fund of \$12,000, and then they should have the farms free of rent during his life, and that the specified sum had been gathered about a year before the father's death, and thereafter the sons had enjoyed the use of the farms free until their father died—*Held*, that the sons had no reason to complain, on appeal, that the chancellor had made too small an allowance to them for services rendered under that contract.

2. Parties who, in their pleadings and proofs, have insisted that they were not accountable to him for the rental value of land of which the ancestor died seized, because they were in possession as equitable owners, cannot, at the hearing, shift their ground, and claim that they were tenants of the ancestor's widow, who might have been entitled to hold the land until her dower was assigned, but who has disclaimed such a right.

On appeal from a decree advised by Vice-Chancellor Bird, whose opinion is reported in *Larison v. Polhemus*, 9 *Stew. Eq.* 506.

Mr. James Buchanan, for appellants.

Mr. W. H. Vredenburg, for respondents.

The opinion of the court was delivered by

DIXON, J.

According to the list of causes, two appeals were to be presented to the court in this case, of which one seems to have been instituted on behalf of the complainants in the original bill, and the other on behalf of John and George Polhemus, two of the defendants. According, however, to the case laid before us, and to the brief of counsel on one side, only the latter appeal has

Larison v. Polhemus.

been prosecuted to issue, and we have therefore considered merely such questions as this appeal raises.

The original bill was filed by Achsah A. Larison and others, to obtain a partition among the heirs of Tobias Polhemus, of the real estate whereof he died seized, including the "Craft" and "Hendrickson" farms, and to charge against the shares of John and George Polhemus, two of these heirs, the rental value of those farms, which they respectively had occupied since Tobias's death, on March 10th, 1879. John and George answered, setting up that they equitably owned the "Craft" and "Hendrickson" farms, under an agreement with their father, Tobias, made many years before, to the effect that if they would work the farms, and give their father the surplus above their living, until a fund of \$12,000 was accumulated and put at interest, so that he and his wife should have enough to live on, then the "Craft" farm should belong to John, and the "Hendrickson" farm to George, in pursuance whereof they claimed that they had performed their part of the contract by the spring of 1878, and then their father had given up the farms to them respectively.

Soon after filing their answer, these defendants presented a cross-bill, alleging the same state of facts, and praying for the specific performance of the bargain, by a decree that the other heirs should convey the farms to them, or such other decree as would vest in them their equitable rights, and secure to them the results of their labor, according to the true intent of said bargain.

On final hearing, the vice-chancellor advised a decree, which was made February 13th, 1883, that the agreement set up in the answer and cross-bill had not been proved as a contract to convey the farms, and that the prayer of the cross-bill should be denied. He, however, reached the conclusion that a contract to give up to these sons the rents, issues and profits of the farms was established, and had been actually executed, by the sons earning the specified sum before the spring of 1878, and by the father's then surrendering the farms to them for use and occupation free of rent; but he further held that the sons' right of possession under this contract ended at their father's death.

Larison v. Polhemus.

No complaint is made in this court that these conclusions are not warranted by the evidence, and upon them as a basis the vice-chancellor proceeded to take an account of the sums with which the sons should be charged for the use of the farms which they were still holding at the time of final decree.

By decree dated May 14th, 1884, he makes an allowance to the sons for services rendered in working the farms during a period beginning December 5th, 1873, six years before the filing of the cross-bill, and ending in the spring of 1878, when the farms were given up to them, and charges them with rental value from the time of their father's death.

From this decree the sons appeal, insisting, first, that the allowance to them should begin with the beginning of their services, which was many years prior to 1873.

Accepting as true the conclusions before mentioned, which are not here disputed, the sons cannot be aggrieved by the smallness of the allowance for services rendered. Those services were performed under an express contract, and the rights to which they gave rise were simply such as that contract specified. According to its terms, the surplus derived from the farms under the management of the sons, was to belong to the father until it amounted to \$12,000, and in consideration thereof the sons were thereafter to have the free use of the farms during the father's life. Whether one of these things would be equivalent to the other, was a matter for the parties to decide before they entered into the stipulation, but the contract being made, the court has no further duty than to secure to each party what they have bargained for. This was done for the sons. When the vice-chancellor decided that they should pay no rent for the use of the farms between the spring of 1878 and their father's death; when he went beyond, and made a pecuniary allowance to them for previous services, we do not see on what principle they can complain that the allowance is too small. If they are to be paid what those services were worth, then they must be charged with the rental value of the farms during the whole period of their occupancy while their father lived, and the contract which they have established must be disregarded. Such a position the ap-

Larison v. Polhemus.

pellants are not at liberty to take, and therefore this portion of the decree cannot be disturbed. This view of the case renders it unnecessary to consider whether the claim of the sons for remuneration is one that can properly be set up in a suit for partition.

Another ground of appeal is that the appellants have been charged with rent for these farms from the death of their father, they insisting that they are chargeable with such rent only from the death of his widow, who lived until September 30th, 1880. Their claim is that she was entitled to the possession of these farms as the message of her deceased husband's mansion-house, her dower not having been assigned, and that their occupancy being with her consent, they are not responsible to the heirs for rental value.

But both the answer of these sons, in which the widow joined, and their cross-bill expressly aver that they held possession under a claim of title in themselves, and not in the widow, and that she disclaimed any dower right in these farms; nor is it anywhere in the pleadings or proofs suggested that they were her tenants, or that their possession was hers. It is now, therefore, too late for them to make such a claim.

The last cause of appeal is that the rents charged against the sons since their father's death are excessive. After careful examination of the testimony, we are not disposed to interfere with the estimates of the vice-chancellor.

The decree below should be affirmed.

Decree unanimously affirmed.

Hendrickson v. Woolley.

PEARSON HENDRICKSON et al., appellants,

v.

EZRA WOOLLEY, respondent.

1. The presumption is, that the mortgage first recorded is the first lien; and to overcome such presumption, it must be proved that the mortgagee of the mortgage first of record, at or before the time he took his mortgage, had knowledge of the existence of the mortgage first in date.

2. The notice, if any, must be taken with the qualifications attached to it by the agreement of the mortgagee of the unrecorded mortgage; and if such mortgagee has agreed with the mortgagor to keep his mortgage off the record, in order that the mortgagor may borrow more money on the property to be secured prior to such mortgage, and such agreement be made known to the mortgagee of the mortgage second in date, but first of record, at or before its execution, such notice will not give the unrecorded mortgage priority.

3. In such case the priority of the mortgage first in date is waived.

On appeal from a decree advised by Vice-Chancellor Van Fleet.

Mr. Robert Allen, Jr., for appellants.

Mr. James Steen, for respondent.

The opinion of the court was delivered by

PARKER, J.

On the 3d day of January, 1876, James Bell executed and delivered to Ezra Woolley a mortgage on lands in the county of Monmouth.

On the 15th day of February, 1881, Bell executed and delivered to Pearson Hendrickson, trustee of William R. Smock, another mortgage on the same premises.

The mortgage to Hendrickson was recorded on the 19th day of February, 1881, and the mortgage to Woolley on the 19th of April, 1881, being two months subsequent to the record of the Hendrickson mortgage.

Hendrickson v. Woolley.

In 1883, Woolley commenced foreclosure proceedings on his mortgage. He made Hendrickson a party, and claimed that at the time Hendrickson took his mortgage he had knowledge of the existence of complainant's mortgage.

The decree declares complainant's mortgage first in order of priority, and from this decree Hendrickson appeals.

The date of record of the respective mortgages makes Hendrickson's mortgage the first lien.

The presumption is, that the mortgage first recorded is the first lien; and to overcome such presumption, it must be proved that the mortgagee of the mortgage first of record knew, at or before the time he took his mortgage, of the existence of the mortgage first in date.

Does the evidence in this cause prove that Hendrickson, when he took his mortgage, or before that time, had any knowledge of the existence of the Woolley mortgage? It is not alleged that Woolley had given him such information, nor that any person except Bell (the mortgagor) had mentioned the existence of the Woolley mortgage to Hendrickson, until after Hendrickson had made the loan to Bell and taken his mortgage.

Bell swears that before the execution of the mortgage to Hendrickson he told him that Ezra Woolley had a mortgage on the property, which was not recorded. He says he told him this more than once, and particularly specifies a time, in Robert Allen's office, on the day the mortgage was drawn and before it was executed. He says that at that time he told Hendrickson, in the presence of Mr. Allen, that Woolley held an unrecorded mortgage on the premises.

Bell is contradicted by the testimony of Pearson Hendrickson, Robert Allen and William D. Campbell.

Mr. Hendrickson swears that Bell did not at any time previous to his loaning him the money and taking from him the mortgage therefor, say to him, or to any one in his presence, that Ezra Woolley had a mortgage on the premises in question, unrecorded or otherwise, but that Bell repeatedly told him that there was no encumbrance on the property except a mortgage for a small amount given to Dennis Valentine, which he would pay off out of the money he would receive from Hendrickson.

Hendrickson v. Woolley.

Hendrickson further says that he never heard of any mortgage on the property except the Valentine mortgage, until after he had taken his mortgage and had sent it to Freehold to be recorded.

Robert Allen swears that Bell and Hendrickson came to his office on the day the mortgage to Hendrickson was executed, and requested him to prepare the mortgage, and that before the mortgage was executed and the check for the money loaned given to Bell, he (Bell), in response to a question put by Allen, said to him, in the presence of Hendrickson, that there was no encumbrance on the property he was mortgaging to Hendrickson, except the Dennis Valentine mortgage.

William D. Campbell, to whom Bell originally applied to find the loan for him, and who introduced him to Hendrickson, swears that in conversation, in his presence, on the subject of the loan, Bell told Hendrickson that the Valentine mortgage was the only encumbrance on the property.

Bell is thus contradicted, upon the vital question of notice, by three witnesses.

The remaining testimony on this question relates to alleged declarations of Hendrickson, subsequent to the execution of his mortgage, as to his prior knowledge of the existence of the Woolley mortgage. That the declarations alluded to in such testimony were made is denied by Hendrickson in his evidence. In view of Hendrickson's denial, and the proof made by the witnesses before named, the complainant has failed to satisfy the court that Mr. Hendrickson had any knowledge of the existence of the Woolley mortgage prior to the time he loaned the money to Bell and took from him a mortgage therefor.

A fact in confirmation of this view is the small value of the property mortgaged. The weight of evidence is that the premises are not worth more than the amount due on the Woolley mortgage, interest and costs, and it is not probable that Hendrickson would loan on a second mortgage upon property of such small value.

But suppose Mr. Bell did inform Hendrickson of the existence of the Woolley mortgage, what did he say to him about it? The

Hendrickson v. Woolley.

whole conversation in which it is claimed that notice was given, should be considered, in order to ascertain if it was such notice as would give priority to the Woolley mortgage.

Bell swears that on the day he received the money from Hendrickson, and executed to him the mortgage to secure it, he told Hendrickson that he had spoken to Ezra Woolley about the loan he proposed to obtain on the property, and that Mr. Woolley did not make any objections; also that he told Hendrickson that there was an agreement between himself and Woolley that Woolley would keep his mortgage off of record. When Bell was asked if he then told Hendrickson that Woolley promised to keep his mortgage off the record so that Bell might borrow more money on the property, he made the evasive answer that he did not recollect of telling Hendrickson so *at that time*.

Now, if Bell did say anything to Hendrickson, before he executed the mortgage to him, about an unrecorded Woolley mortgage (which Hendrickson denies), it is clear, from Bell's testimony, that he gave Hendrickson to understand that Woolley, by agreement, had kept it off the record so that he (Bell) might borrow more money on the property, the security for which would be entitled to priority.

What Bell stated to Hendrickson in the absence of Mr. Woolley would not bind Woolley to the truth of the statement, but if the fact be that Woolley kept his mortgage off the record for the purpose of enabling Bell to borrow money on the security of the premises, and that such was the agreement between Bell and Woolley, then if Bell, before he gave the mortgage to Hendrickson, told him of the unrecorded Woolley mortgage, and also told him of the agreement to keep it off the record by Woolley, and the object thereof, the right of priority of his mortgage was waived by Woolley.

What does Bell's testimony show as to the alleged agreement with Woolley? Bell swears that there was an agreement between himself and Woolley, at the time he gave the mortgage, that Woolley should keep it off the record. When asked what was the reason given for such agreement, Bell said there were several reasons given, and one was that he did not want people

Hendrickson v. Woolley.

to know that his property was mortgaged. On being again asked for another reason, Bell answered thus: "I said to Mr. Woolley I might want to raise some money on the house, and I would probably have a chance to sell it, and I did not want anything standing against the property." In this connection Mr. Bell adds that he does not recollect promising Mr. Woolley to let him know before he put any other mortgage on the property. The following question was then put to Mr. Bell, viz.: "Did Ezra Woolley acquiesce in your arrangements or talk with him?" to which he replied, "Well, he made no objections; he smiled and said he guessed it would be all right." Mr. Bell further says that two or three days before he got the money of Mr. Hendrickson he went to see Mr. Woolley and asked him if he had any objection to his getting the money and leaving his mortgage second, and that Mr. Woolley replied that he was willing to do anything to help him.

Mr. Hendrickson says that after the execution of the Hendrickson mortgage, Mr. Woolley said to him that he had promised Bell he would not put his mortgage on record, as he (Bell) might want to borrow some more money.

Ezra Woolley, in his testimony, contradicts Mr. Bell and Mr. Hendrickson in reference to what they testified to about an agreement to keep his mortgage off of the record, yet when asked to explain why it was kept off the record so long, he said only by confidence in Bell, and added that it was kept off of record on account of its not looking well up there at Freehold on his property. Mr. Woolley further said that Bell requested him to keep the mortgage off the record at the time he delivered it over the counter to him in his store—that it did not look well on the record as long as he might want to sell. From the whole evidence on this part of the case, it is clear that there was an agreement between Mr. Woolley and Mr. Bell, at the time he gave the mortgage to Woolley, that Woolley should not record the mortgage, so that Bell might be enabled to sell or to borrow money on the premises upon security to be prior to his, and that when Bell was about procuring a loan from Hendrickson, Mr. Woolley knew of his efforts to obtain a loan and acquiesced in it,

Hendrickson v. Woolley.

saying, when asked "if he had any objection to his [Bell's] getting the money and leaving his [Woolley's] mortgage second," that "he was willing to do anything to help him [Bell.]"

Under these circumstances Woolley waived the priority of his mortgage if Bell told Hendrickson, before the execution of the mortgage to Hendrickson, what Bell says he did. So that, whether Bell on one side, or Hendrickson, Allen and Campbell on the other, be believed as to what was said by Bell to Hendrickson, before the execution of the mortgage to him, the mortgage to Hendrickson is entitled to priority over the Woolley mortgage.

If it be true that Bell did not tell Hendrickson about the Woolley mortgage, but said to him that there was no encumbrance on the premises except the Valentine mortgage, as Hendrickson, Allen and Campbell say he did, and if it be true that Hendrickson did not know of the existence of the Woolley mortgage until after the execution of the mortgage to himself, then the Hendrickson mortgage is entitled to priority.

Or, if it be true that Bell told Hendrickson, before he gave him the mortgage, of the existence of the Woolley mortgage, unrecorded, and said, also, that Woolley had agreed with him to keep his mortgage off of record, so that Bell could sell or borrow money on the premises on security which would be prior to Woolley's mortgage, and that what Bell said to Hendrickson about such agreement with Woolley was true, then Hendrickson's mortgage is still entitled to priority. Such qualified notice of the existence of an unrecorded mortgage, prior in date, is not such notice as is contemplated by law. The notice must be taken with all the qualifications attached to it under the agreement of the mortgagee of the unrecorded mortgage.

The decree is reversed.

For affirmance—DIXON, KNAPP, VAN SYCKEL—3.

For reversal—THE CHIEF-JUSTICE, DEPUE, PARKER, REED, SCUDDER, BROWN, CLEMENT, COLE, PATERSON, WHITAKER—10.

Jackson v. Reynolds.

JOHN JACKSON, appellant,

v.

JOHN REYNOLDS et al., respondents.

The orphans court has the power to open a decree settling an intermediate account of trustees, in which it appears that commissions were allowed in excess of the sum fixed by the statute.

On appeal from a decree of the ordinary, whose opinion is reported in *Reynolds v. Jackson*, 9 *Stew. Eq.* 515.

Mr. J. D. Bedle, for appellant.

Mr. J. S. Barkalow, for respondents.

The opinion of the court was delivered by

REED, J.

James Jackson died in 1869. He appointed as executors of and trustees under the provisions of his will, William Gledhill, David Burnett, John Reynolds and Samuel Smith.

The surviving executors—Gledhill having died—settled their final account in the Passaic orphans court, at the April term, 1871. They were allowed commissions amounting to \$5,000. Thereafter the surviving executors held the estate as trustees. One of them, Burnett, in August, 1873, died. Smith and Reynolds, the survivors, settled an account at the December term, 1874, of the Passaic orphans court.

At the same term of the Passaic orphans court, Messrs. Smith and Reynolds and George B. Day (who had been substituted as trustee by virtue of the power conferred upon the surviving trustees by the fifth clause of testator's will) settled an intermediate account.

Jackson v. Reynolds.

In 1877 and in 1879, intermediate accounts were settled by the same trustees.

In 1881, another intermediate account was filed, and to this account exceptions were filed.

The substance of the exceptions was, that in the first previous account of 1875 commissions in excess of the statutory standard had been allowed to the trustees to the amount of \$1,102.60; that in the same account of 1875 an excess of \$677.92; that in the account of 1877 an excess of \$552.60; and that in the account of 1879 an excess of \$704.88 had been erroneously allowed as commissions.

Upon the hearing of these exceptions, it was ordered by the orphans court that the allowance of commissions in the respective accounts be set aside, and that it be referred to a master to report the allowance to be paid to the said trustees according to law. This order was reversed by the prerogative court. The allowance of commissions in excess of the rate permitted by the statute was held in the case of *Culver v. Brown*, 1 C. E. Gr. 533, to be a mistake, and a decree by the orphans court opening the final decree of that court settling a guardian's account, was, upon the appearance of that fact as one of the grounds for opening the final decree, affirmed in the prerogative court.

And, inferentially, this seems to have been the view of the supreme court in the case of *Johnson v. Eicke*, 7 Hal. 316, for in that case the allowance of commissions was held not to be a mistake, because the sum allowed was within the range of discretion of the court which settled the account.

If the allowance of these commissions clearly beyond the limit fixed by the statute and beyond the scope of the discretionary functions of the orphans court, was a mistake, then by the one hundred and eighth section of the orphans court act, even on a final decree, such error may be corrected. It surely cannot be successfully claimed that a partial account which is the substructure of the final decree, has a greater degree of conclusiveness than the final decree itself.

In the case of *Liddel v. McVickar*, 6 Hal. 44, it was held that if by mistake, or other just or sufficient cause shown to the court,

Jackson v. Reynolds.

an omission has taken place in a partial account exhibited in the orphans court by an administrator, such omission may be corrected and just allowance made to the administrator upon settling his final account.

It is true that a partial account once settled is deemed *prima facie* correct, and there should be convincing evidence of error before the orphans court should open it, or upon final accounting should correct it. Here, however, there is no question concerning the presence of evidence upon which the action of the court was grounded, for the error appears conspicuously upon the face of the accounts. That the power existed in the orphans court to correct the error is, I think, manifest.

Regarding the method of procedure adopted in the present case, it may be said that probably the better practice in dealing with a partial account, in which an error is alleged to exist, is to attack it directly by a rule to set it aside in respect to the matter complained of. This has the advantage of directness, and in bringing into court parties who may have been interested in the first, but have no interest in the last account. Such parties, for instance, are deceased or discharged executors, or trustees who have settled their account as joint trustees with those still surviving.

Where, however, the parties to both accounts are identical, there is no apparent reason why the court cannot deal with an error in the first account whenever there are exceptions filed to the last account, clearly pointing out the error alleged to exist in the earlier account. All parties have notice, and so have the opportunity to be heard.

Now, this is the position of affairs in the present cause, with the exception of the first account in the year 1875. In regard to that account, it appears that one of the joint trustees who was interested in that account is dead. It appears, however, that the exceptions filed to the last account do not attack his share of the commissions. The decree of the orphans court opening the account, in regard to the allowance of commissions therein made, was correct, inasmuch as a large part of the excessive allowance was paid or retained by those who are settling this account.

Maps v. Cooper.

As to them the court can, in resettling the account, adjust the allowance of commissions to the statutory scale. As to the deceased trustee, neither under the exceptions nor in the absence of notice to his representatives can the court affect his share of the allowance, nor does the present decree disturb his rights. I think the decree below should be reversed, and the matters should be by the prerogative court remitted to the orphans court, to be proceeded with there in the manner indicated in their decree.

Decree unanimously reversed.

SOLOMON MAPS, appellant,

v.

THOMAS W. COOPER et al., respondents.

Where the trustees of a corporation gave a bond, secured by a mortgage on the corporate property, which, in strict legal effect, bound them individually, a court of equity will enjoin an action at law against them thereon, if it appears that there was no intention on their part to become personally liable.

Mr. Robert Allen, Jr., for appellant.

Mr. Wilbur A. Heisley, for respondents.

On appeal from a decree advised by Vice-Chancellor Bird, whose conclusions are as follows :

On April 3d, 1862, William R. Maps and others, residents of Long Branch, filed, in the clerk's office of the county of Monmouth, a certificate in which they express their intention to form themselves into a religious denomination, and take upon themselves the name of "The Trustees of the Methodist Episcopal Church of the village of Long Branch." They purchased a lot and built a house for worship. On these they executed a mort-

Maps v. Cooper.

gage to Maps & Slocum for \$5,700. December 13th, 1870, Maps & Slocum assigned this mortgage to the defendant, Solomon Maps. After this, the church erected a new edifice and denominated it "The Centenary M. E. Church of Long Branch," without any alteration of the certificate above referred to. In this undertaking the church became largely indebted, and having an opportunity to borrow money of the Long Branch Building and Loan Association, which would only loan on first mortgage, a committee was appointed by the trustees of the church to wait on Solomon Maps and request him to consent to the cancellation of his mortgage and to accept another in lieu thereof, but subsequent to the one proposed to be given to said building and loan. The committee waited upon the defendant. At that first interview he declined to comply, but promised to see them again; he did so, and consented to their request. The committee reported to the board of trustees that he was willing to cancel his mortgage, take another and come in second. The board passed resolutions in conformity thereto, executed and delivered a first mortgage to the building and loan association and a second one to the defendant, which he accepted, and surrendered the one which he had held for years, and which was first, for cancellation. It was canceled, the building and loan mortgage was then placed on the record, and after that the defendant's second mortgage. Afterwards the building and loan foreclosed their mortgage, made the complainant a party, sold the premises, and Solomon Maps, the defendant in this suit, purchased, but at a price greatly below the amount due on both mortgages.

After the defendant had held the title for some time, the same congregation, under the name of "St. Luke's M. E. Church," negotiated with him for the purchase of the premises, and he made title to them. He did not realize enough to save himself from loss by over \$3,000.

After all this, the defendant commenced an action at law against the complainants in this suit for the recovery of the balance due upon his bond. This suit in equity has been instituted to restrain that action, and to declare the true intention of the parties to the transaction.

Maps v. Cooper.

All the above-stated facts are well established. The defendant in this suit says that he commenced his action at law because the complainants in this suit were individually liable to him for the amount still due on his bond. He makes a strenuous effort to establish their liability by showing that they induced him to surrender his mortgage and come in subsequently to the building and loan, by promising that they would become individually responsible to him for any loss.

The proof does not satisfy me that there was any such undertaking on the part of the two who, as a committee, waited upon Mr. Maps. I do not find a particle of proof connecting the other five members of the board of trustees with any promises or undertaking whatever with Mr. Maps, except so far only as they became liable by signing the bond in the manner or form they did. Each one signed his own name both to the bond and mortgage. But from the answer and the course of the examination of witnesses, the effort was to prove that they signed in this manner because they had so agreed with Mr. Maps, thereby intending personally to bear any loss which he might otherwise sustain. This effort, I think, has failed, because five of the trustees never made any contract whatever with Mr. Maps as to their individual responsibility. It does not appear that they saw Mr. Maps. The only persons who did see him were Sloeum and Wardell, who were authorized by a resolution of the board of trustees to wait on Mr. Maps and procure his consent to take the second place. There is no evidence beyond this. Wardell and Sloeum swear that they did not speak of nor undertake anything else. Some effort is made to prove the contrary by the oaths of Mr. Maps, Mrs. Maps and a daughter, but, I am free to say, it comes far short of convincing me, whatever they may have understood respecting it. But suffice it to say that as to the five trustees, the other two could not bind them personally. Therefore, if I had found that any promises had been made to Mr. Maps, by the two, on which to found an equitable decree, it could not be extended beyond the two who ventured to make the promises. The belief that there was no contract or promise of individual liability is strengthened by the fact that Mr. Maps accepted a

Maps v. Cooper.

bond in which the said seven individuals as "Trustees in Trust of the Centenary M. E. Church of Long Branch," "and their successors or assigns," obligated the payment, and by the fact that after the foreclosure and sale under and by virtue of the building and loan mortgage, Mr. Maps frequently spoke of the transaction as a financial loss to himself, and also by the fact that he never called upon either of the bondsmen for payment, individually, up to the time he commenced his action at law.

It is further to be considered that Mr. Maps certainly regarded this bond as the bond of the corporation, for it was executed in the same informal and irregular, if not unlawful, manner as the mortgage was. Neither instrument was so executed as to bind the corporation in an action at law. The corporation had adopted a name and a seal; to these instruments neither was affixed; nor was either affixed to the bond and mortgage given to the building and loan; nor to the bond and mortgage which Mr. Maps had long before taken an assignment of, and held as the bond and mortgage of the corporation, and which he treated as its obligations.

I remark, again, that this bond was executed in the same manner as the mortgage which was given on the real estate of the corporation to secure the payment of the bond, and that Mr. Maps treated that mortgage so executed as the mortgage of the corporation, and under it, and another similarly executed, he accepted title to valuable real estate, and undertook to convey a good title to it for a large sum of money. I infer from this fact that if Mr. Maps regarded the mortgage as the deed of the corporation, it is most fair to presume that he so regarded the bond.

But it is said that whether there was an agreement established that the individuals who signed were to be bound individually or not, they did, by the bond which they signed, and which Mr. Maps accepted, so bind themselves. The bill admits that this is the legal effect of the instrument as it stands, but insists that it was the intention and understanding of all parties to bind the corporation only, and prays this court so to decree, and to perpetually enjoin the defendant in this suit from prosecuting his action at law. I think that the facts above recited, out of which

Maps v. Cooper.

the defendant attempted to establish an agreement between himself and the trustees, before the bond was executed, that they should become personally bound, not only establish that there was no such previous understanding, but, with great certainty, establish that all parties intended to contract for and with the corporation alone. I need not cite authorities to show that under such circumstances the court has the power to grant relief, and that it is its duty so to do. And this rule is most reasonable and just. For as these papers stand, the defendant, Mr. Maps, could not have proceeded against the corporation, had the corporation resisted. Suppose, when he offered his mortgage in the foreclosure suit above named, the corporation had said: "Our church property is not bound, because the corporation has not, as such, executed the mortgage on which you rely," most certainly Mr. Maps would have been accorded relief in this court, had he prayed for it.

I will advise a decree accordingly.

The decree was affirmed without any opinion being delivered on behalf of the majority of the court.

PATERSON, J., delivered the following dissenting opinion:

My conclusion differs from that reached by a majority of the court, and I think the peculiarity of the attending circumstances calls for more than a mere signification of dissent. The bill admits the legal liability of the obligors, by reason of the informal and irregular execution of the bond. In this the opinion below concurs, and so but a single question remains for determination. That is, are the facts such as to entitle the complainant appellees to relief? In my opinion, no equitable interference is warranted, and for these reasons.

It is established that two bonds similar in form, and also in the want of a lawful ingredient of that kind, were executed by the trustees to Mr. Maps. One was given to replace the other, and by the exchange, the appellant retained a subsequent instead of a prior encumbrance on the premises described in the mort-

Maps v. Cooper.

gages. Upon the circumstances, and under the representations by which one of that pair of securities was substituted for the other, the *status* of the parties in a court of equity must depend.

Now, it is apparent, from the evidence, and established just as clearly as the execution of the double securities, that the negotiation for the transfer was initiated and pursued by the complainants. They, and not the defendants, moved in the matter, and, as is demonstrated, most fully for their own advantage and benefit. This is a valuable factor or element in considering the case, and should be kept steadily in the foreground. The testimony throughout is all one way as to this. Mr. Maps had no connection with the religious society of which the complainants were trustees, was not interested in its welfare or prosperity, and does not appear as a contributor to its temporal wants, much less as a lay brother or class-leader in spiritual affairs. The appellees could not approach him with such an inducement, nor offer it as a make-weight to their argument. Here then, is a transaction begun, continued and completed by the trustees, on their own motion, and of their own volition, which all of them testify, to use the words of one, "was done for the benefit of the church and church property," initiated at an official meeting, a committee appointed to wait on the mortgagee, and ask or persuade him. I quote again, "to release the mortgage he held, and take one behind that of the building loan," for no additional consideration, an exchange proposed by the officers of a religious body, to an old man, almost a centenarian, though not a member of their centenary society, not versed in legal business, possessed of little or no other property, and aided by no legal advice, the prominent actors, one after the other, coming forward and disclosing facts, creditable, it may be, to business sagacity and selfish instincts, but the contrary, in other respects—here, I say, is a transaction which these managers of a Christian church bring before a court of equity as coolly as they sought relief from their mortgagee on a previous occasion, and urge that as a reason for relief here for transferring the burthen of a debt of their own creation from themselves, the rightful obligors, and fastening it for all time on one whom they sought, and success-

Maps v. Cooper.

fully, to part with a good and primary for an insufficient and secondary security. What is it but saying virtually to Mr. Maps, at the time of the negotiation, in language something like this: We can raise money to improve our church property, if you will consent to exchange the mortgage you hold for a subsequent security of that nature. Our object is to promote the advantage and interest of the society, and an opportunity is offered of obtaining a loan by your assistance. We can promise no additional consideration for complying with our request, as we do not intend to incur any personal liability in the matter. We are not now responsible, and do not mean to become so. We will be frank, and tell you we will give you only another bond and mortgage of a character similar to what you have now, but as the new one we propose to execute will be to a building loan association, the principal will be reduced by monthly payments, and you can be benefited to that extent. What we desire to raise is some \$7,000, and we come as a committee from the trustees, to ask you to have a mortgage for that amount set before the one you hold for \$4,700. You see it is a modest request, good sir, and also the dilemma in which we are placed. We will not help ourselves by taking any responsibility, but we want you to assist us in the way we have devised and point out to you now. It is easy to do so, for you have only to assume all risk, and do for us what we will not do for ourselves.

This is no exaggerated or highly-colored representation of what actually occurred during the negotiations, and is warranted most fully by the evidence spread upon the record by the complainants. On this ground, clearly, the appellees are entitled to no relief as against Mr. Maps. No one of them was willing to assume, and all were anxious to disclaim, any responsibility for an act which they say, expressly, was intended to promote the benefit of the religious society with which they were connected, but are ready and quick in asserting that their mortgagee agreed to do for them just that thing, without consideration or motive, beyond their simple request, and with full knowledge of his act. If Mr. Maps had been shown to be a religious fanatic, and one who had contributed freely and lavishly, or wasted his money

Maps v. Cooper.

for religious purposes, such a thing might have been urged with some degree of plausibility, but, so far as appears from the depositions, he seems rather more of a sinner than a saint, excepting in this case. There is this to be said further just here, that the action of the committee, unless disclaimed, was the action of all.

Again, the legal effect of the instrument, as it stands, is to bind the obligors, and that being so, why should equity interpose, and relieve those obligors from a debt all say was incurred for the benefit of a society in which they were interested, but where Mr. Maps is not shown to have united with them even so much as in singing a doxology? It is said he could not have foreclosed against the society if that had been contested, but the latter did not resist, and so that consideration is eliminated here. The trustees were advised, no doubt, what would be the effect of a successful defence to such a proceeding, and that want of formality, while fatal to the mortgage, would but make them liable for the full condition of the bond. Their legal guide mapped out for them a wiser policy, and one that has proved to exempt them from any liability. In the view I have taken, it is immaterial how Mr. Maps or the trustees regarded the mortgage, or whether the former could have obtained relief under a different state of things; we are dealing with cold facts, not ideal suppositions. The one grand controlling equity feature of the case is, that the debt is that of the society, and not of Mr. Maps, and as the cold steel of the law will compel the trustees to make restitution to him for what part of their obligation he has paid, the law should be left unrestrained, and its trenchant blade free to do the proper work of right.

For affirmance—CHIEF-JUSTICE, DEPUE, DIXON, KNAPP, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE—11.

For reversal—PATERSON—1.

Hance v. Frome.

WILLIAM HANCE and PETER RICE, executors of ROBERT
P. RAMSEY, deceased, appellants,

v.

MARY FROME, respondent.

Mr. Alfred Mills, for appellants.

Mr. C. H. Valentine, for respondent.

On appeal from a decree of the chancellor, whose opinion, delivered at the October term, 1883, is as follows :

The complainant is the wife of Samuel Frome and the daughter of Robert P. Ramsey, deceased, who died August 5th, 1880. She brings this suit against her father's executors to recover money which she alleges is due her from his estate for trust funds belonging to her received by him, as her trustee, on certain promissory notes and a certain judgment, and to obtain from the executors the transfer to her, or to another trustee for her benefit of the trust property (other than that money) held by him for her, as she claims, which property consists of the judgment just mentioned—a wood-lot of twenty-seven acres and a bond and mortgage for \$3,000 and interest. The bill states that Ramsey advanced to the complainant in the Spring of 1876 \$2,000, which, with his approval, she lent to her husband, taking his note therefor, dated April 1st in that year ; that afterwards he gave her \$250 in cash, which, also, with his approval, she lent to her husband, but took no note therefor ; that at the time of making these loans to her husband he was in a public office in his county (Warren), owned valuable real property there, consisting of two farms, a heavily-timbered wood-lot of twenty-seven acres, and a house and lot of five acres, and was supposed by her and her father to be in easy and prosperous circumstances ; that in the Spring and Summer of

Hance v. Frome.

1878 there was an official investigation of the financial affairs of the county, in which her husband was implicated, and which resulted in his being indicted with others for conspiracy in the fall of that year, but he was, on trial, acquitted; that her father, who was then advanced in years, was, in view of the difficulties in which her husband was involved, anxious that the latter should secure to her the money he owed her for the before-mentioned loans, and requested her to allow him to arrange the matter for her as her trustee, promising that if she would do so he would get her claim secured and hold the securities until collected, and pay over the money as he might collect it upon them; that she consented, and accordingly gave him the above-mentioned notes which her husband had given her; that he demanded payment from her husband, but the latter alleged that he was at that time unable to discharge the indebtedness, and gave to her father, as her trustee, his note, dated November 1st, 1878, for \$2,586.66 for principal and interest, payable to Robert P. Ramsey, trustee, on which Mr. Ramsey subsequently recovered judgment against her husband in the Warren circuit court and issued execution thereon, under which a levy was made, and that the judgment still remains wholly unpaid and unsatisfied; that before the giving of the last-mentioned note, and on the 24th of October, 1878, her husband conveyed to her father, without consideration, as trustee for her, and in trust to sell and convey the property for the best price he could get for it, and pay the money over to her on account of her debt, the wood-lot and the house and lot; that in March, 1879, her father sold the house and lot for \$250, and that he paid that money over to her in accordance with his trust; that on the same 24th of October, 1878, her husband gave her father a mortgage on one of his two farms for \$3,000 and interest, to be held by him as security for her debt, and that after the judgment was recovered by her father on the trustee note, he obtained from her husband, on the 17th of December, 1878, the assignment of a judgment recovered by John C. Danley, a debtor of the latter, against the trustees of a school district in Warren county, for \$1,153.40; the money which might be collected from the last-mentioned judgment to be applied to the payment of the

Hance v. Frome.

judgment recovered by her father, as her trustee, against her husband; and that at the same time her husband transferred to her father certain promissory notes given to the former: one by Josiah Ketcham for \$157.50, one by William Ketcham for \$100, one by Henry Winter for \$300, one by Thomas P. Frome for \$100, and one by James F. Boyd for \$103—the moneys which might be collected from which were to be credited on the last-mentioned judgment. The bill states that Mr. Ramsey collected all the notes and retained the proceeds in his own hands, and never paid any of them over to her, and that he never accounted to her therefor, and never paid over or accounted to her for any money he received on the school district judgment; that he made his will, dated November 27th, 1878, in which he mentions the advance of \$2,000, and that on the 8th of September, 1880, she gave the executors a written notice forbidding them to appraise the \$3,000 mortgage or the school district judgment as a part of his estate, and demanding from them a conveyance of the wood-lot to her. The bill prays a decree that Mr. Ramsey, at his death, was indebted to her, as her trustee, to the amount of the five promissory notes; that he held the \$3,000 mortgage and the school district judgment merely as collateral to the judgment recovered by him as her trustee; that the executors are indebted to her in the full amount collected on the school district judgment, and that they pay over to her out of his estate all the moneys collected for her by Mr. Ramsey under the trust, and that they assign the \$3,000 mortgage to her and execute a conveyance to her of the wood-lot, or that a new trustee may be appointed to whom the assignment and conveyance shall be made for her use. There is also the general prayer for relief.

The executors are the only defendants. By their answer they admit the advance of \$2,000; the lending of that money to her husband and taking the note therefor; the giving by Mr. Ramsey to the complainant of the \$250, and that she lent that also to her husband, but they deny that either loan was with the consent or approval of Mr. Ramsey. They admit the making of the conveyance of the wood-lot and house-lot to Mr. Ramsey, but deny the alleged trust, and aver that the conveyance was given on the

Hance v. Frome.

purchase of the property by him on his own account. They also deny the alleged trust in reference to the \$3,000 mortgage; the school district judgment and the notes, and claim that the mortgage was given and the judgment assigned to Mr. Ramsey on his own account for debt due him from the complainant's husband; and they allege that he never collected the moneys due on the notes, and deny that he ever collected anything on the trustee judgment, or ever recognized it as valid, or ever ratified the obtaining of it, and they aver that it was obtained without his knowledge, privity or consent. They admit that Mr. Ramsey, after the sale of the house and lot, paid over the purchase-money to the complainant, but they deny that he ever accepted any trust in reference to any of the property in question, and allege that the complainant never claimed in his lifetime that he was her trustee, or called on him to account in respect to the property which she now claims he held in trust for her.

Samuel Frome, the complainant's husband, testifies that Mr. Ramsey urged him in the spring of 1878, to secure to the complainant the money that was due to her from him. The reason for it was, that he thought that all who had been concerned in the county matters before referred to (among whom was Frome) would have to go to the state prison. He says that Mr. Ramsey told the complainant that he thought it best that he, Ramsey, should act as her trustee; that he knew more about such matters than she did. He added that she yielded to his request and gave the \$2,000 note up to him accordingly.

It appears, from his testimony, that Mr. Ramsey urged him to secure the payment of his indebtedness to his wife by the transfer of property to him, as her trustee, and that he asked her to leave the management of the matter to him and permit him to act as her trustee, in view of his superior knowledge of business and her inexperience in such affairs. It appears, also, not only by Mr. Frome's testimony, but by that of the attorney by whom the judgment on the trustee note was entered, that Mr. Ramsey was fully acquainted with the fact that the suit was brought on the note, and that it was indeed brought at his request. It further appears, by the testimony of numerous other witnesses,

Hance v. Frome.

that Mr. Ramsey acknowledged his trusteeship. Notably, in the spring or winter of 1879 he said to Daniel A. Young that he had given the complainant \$2,000, which her husband had had the use of, but he thought he had it secured, as the latter had made over to him a judgment against the trustees of the school district, also a wood-lot, and the house and lot and some notes, and if he could collect the judgment her money was safe. The witness says Mr. Ramsey frequently spoke to him about the matter. To Robert L. Garrison he said he held the school district judgment in trust for the complainant, and that if Garrison would advance the money to her for it he would assign the judgment over to him. He also said that he had a \$3,000 mortgage that he held for her, and that he would assign that to Garrison if he would furnish the money. Moreover, it is admitted and it is proved otherwise, also, that he paid over to the complainant the proceeds of the sale of the house and lot as he received them. There is, therefore, no room to doubt that he was her trustee in regard to property placed in his hands for her benefit by her husband to secure to her the payment of his indebtedness to her for borrowed money.

As to the property which he so received and held in trust, the complainant's husband testifies that it was the school district judgment, the \$3,000 bond and mortgage, the wood-lot and house and lot, and the notes mentioned in the bill.

The proof that he held the school district judgment in trust for her is plenary. To Garrison he said he held it in trust for the complainant—that he held it for her benefit. To John C. Danley, the plaintiff in the judgment, he said he held it for her—for her benefit. To William Martenis, one of the trustees of the school district, he said the same thing. To William B. Cramer, that he had taken it from her husband to secure her money. To Isaac S. Dill, to whom he tried to sell it, he said that he wanted the money for her benefit—that it belonged to her. To John Gardner he said he had papers in his hands to satisfy her claim if the district judgment was good, and to Daniel A. Young, as before stated, he said that her husband had made that judgment over to him, and also a wood-lot and the

Hance v. Frome.

house and lot, and the \$3,000 mortgage, and some notes, and that if he could collect the judgment her money was safe. This testimony of Mr. Ramsey's voluntary statements to various witnesses at different times abundantly corroborates Frome's testimony, and supports the allegation of the bill in regard to the judgment. It is urged, on behalf of the defendants, that it appears from Frome's testimony, and also from Garrison's, that Mr. Ramsey was desirous of raising the money on the judgment in order to lend it to the complainant; but the proof is that he said that he had expected, or had promised, to raise the money for her (she wanted to use it, to save one of the farms which had been sold under foreclosure and bought in for her), but was not able to do so, because he had invested his money in some land, but at the same time he said to Garrison that he held the judgment in trust for her, and, as before stated, he said substantially the same thing to others.

The testimony of Young, twice above quoted, is also corroborative of that of Mr. Frome as to the \$3,000 mortgage. So, also, is that of Garrison, who says that Ramsey told him he held that mortgage for the complainant. It is urged, on the part of the defendants, that Frome testifies that the understanding was, that Ramsey was to assign the mortgage to the complainant after the prior mortgage on the mortgaged premises had been paid off out of the money realized for her from the other securities; or, as he otherwise states it, that Ramsey was to hold that mortgage and buy the property, and give her a deed for it, so that she should own the mortgaged premises. But this testimony obviously does not impugn Frome's statement that the mortgage was given in trust for her. It is also argued that inasmuch as Ramsey, at or about the time the mortgage was given, held Frome's note for \$3,000, it is quite probable that the mortgage was given for the note. But Frome swears positively that that note was satisfied otherwise, and was given up to him, and he swears explicitly that the mortgage was not given for the note, or the debt it represented, and that he owed Ramsey nothing when the mortgage was given. It may be added that it does not appear that Ramsey, at his death, held any note against Frome, nor that he had any book-account against him. Two witnesses, as before stated,

Hance v. Frome.

Young and Garrison, testify that Ramsey said the mortgage belonged to the complainant. Why, if it was his own, should he have said it was hers to either of them?

As to the notes, the evidence is not such as to satisfy me that Ramsey's estate should be charged with anything on account of them. Frome's testimony as to them not only is not in any way corroborated, but is in itself unsatisfactory.

The William Ketcham note he appears to have transferred to Ramsey, not on his wife's, but his own account, and he received the money for it. The Winter note, he says, was paid by him to Ramsey, and so, too, of the Thomas P. Frome note, but his testimony as to payment is not satisfactory, and it is a noticeable fact that he never endorsed the Frome note, which was payable to his order. The Boyd note he says he gave to Ramsey in order that he might get it discounted and use the money, which, he says, he owed to Ramsey. The Josiah Ketcham note of \$157.50 was collected by Mr. Ramsey, but I am not willing, from the proof on the subject of the notes, to make any decree against Ramsey's estate in regard to that note. It is true Young says Ramsey told him he had notes among the other securities Frome had given him for the complainant's debt, but he does not say that Ramsey specified any note.

The wood-lot was evidently taken and held by Ramsey in trust for the complainant. According to the evidence, it was by his procurement that the conveyance was made to him. Having thus obtained the title to the property, it would be a fraud in him to deny the trust and seek to apply the property to his own use, and he could not, under such circumstances, be permitted to avail himself of the statute of frauds to effectuate such fraudulent design. Frome swears the lot was conveyed to Ramsey without consideration, and merely as security for the complainant's debt. Young says Ramsey told him he held it in trust for her. It does not appear that Ramsey paid any consideration for the conveyance. Both properties—the wood-lot and the house and lot—were included in the same deed, and it was given on the same date as the bond and mortgage. Ramsey sold the house and lot and paid the purchase-money over, as he received it, to the com-

Hance v. Frome.

plainant. On the evidence, it seems clear that he merely held the property in question in trust for her. But the title is not in the executors. Though by his will he directed them to divide the residue of his property among his three daughters and a grandson, son of a deceased daughter, and, from this provision, title in them may be implied, that property is not included in the provision, it constitutes no part of the residue to be divided. No decree, therefore, can be made against the executors in regard to it. And here reference may be made to a paper put in evidence by the defendants and proved to be a statement made by Ramsey, before his death, substantially claiming the judgment as his own property. It is almost too obvious for remark that that paper is not competent evidence for the defendants. The complainant was not present when it was made, nor was her husband. The paper was written by a friend of Ramsey's who was called in for the purpose, and who wrote it at the dictation of the latter. The complainant's claim cannot be affected by it. And so, too, as to the endorsement made by Ramsey on the bond which the \$3,000 mortgage was made to secure. It is a mere declaration or statement of Ramsey's by which the complainant is not bound, and which is not competent evidence against her.

There will be a decree that the defendants account for and pay over to the complainant the money collected by Ramsey and then upon the school district judgment, without interest thereon. It appears that Ramsey received only \$67.05, and that was received on account of interest and was received in May, 1880, a few months before he died. Since his death the defendants have received \$869.38 on account of the judgment. It will also be decreed that the defendants assign that judgment and the bond and mortgage (it appears that the mortgaged premises have been sold under foreclosure of the prior mortgage) and the trustee judgment to the complainant, the assignment of the school district judgment and the bond and mortgage to contain a statement of the fact that they are to be held by her as collateral security for the payment of the amount remaining due on the trustee judgment; or, if she prefers it, the assignment may be made to a

Gray v. Gray.

new trustee to be appointed by this court. Under the circumstances, no costs will be awarded to the complainant.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor in the foregoing opinion.

ALEXANDER GRAY, executor, appellant,

v.

BENJAMIN GRAY et al., respondents.

Mr. C. T. Reed and *Mr. A. V. Schenck*, for appellant.

Mr. Woodbridge Strong, for respondents.

On appeal from a decree of the ordinary, whose opinion, delivered at the May Term, 1883, is as follows :

The orphans court of Middlesex county, by their decree of May 7th, 1883, removed Alexander Gray from his office of executor of the will of his late father, Alexander Gray, senior, deceased, and appointed an administrator *de bonis non* with the will annexed, in his place, and directed Gray to deliver over to the administrator all the property of the estate in his hands, and state and settle his account as executor. The grounds of this action on the part of the court were, that they were satisfied, from the proofs in the matter, that Gray had wasted and misapplied the estate, or some part thereof, and had abused the trust and confidence reposed in him as executor. The application was made by Jane Gray, widow of the testator, and Jane Gray the younger, and Isabella and Benjamin Gray, all of Middlesex county, children of the testator. From this decree the executor appealed. The evidence in the matter shows that

Gray v. Gray.

on or about the 26th of May, 1874, Gray and his co-executor, his brother John, now deceased, filed, in the surrogate's office of Middlesex county, their joint partial account as acting executors of their father, by which it was ascertained that there was a balance of assets of the estate in their hands, of the value of \$100,421.66, or thereabouts. Afterwards, in May, 1875, citation to account was issued on the application of Jane Gray the elder and Jane Gray the younger, and Isabella Gray and other children of the testator, and under it Alexander and John accounted again, but this time not jointly as before, but separately. In the account filed by Alexander, he charged himself with \$11,918.04, and prayed allowance for (among other things) \$9,660, as paid on a claim which he made against the estate for his interest, \$20,000, in a mortgage given by Hosie and Longstreet, which interest he alleged he sold or assigned to his father in 1867, and interest on the \$20,000 to June 1st, 1875, \$11,200; the claim being at that date for \$31,200, principal and interest. Exceptions to the account and to the allowance of that payment of \$9,660 were filed by several of the persons interested in the estate. When the matter of the exceptions came up for hearing, the court being of opinion that it had no jurisdiction over the subject of that claim, declined to hear the evidence in support of it, and subsequently, August 22d, 1876, Gray filed his bill in the court of chancery of this state, against his co-executor, John Gray, and the other persons interested in the distribution of the estate under the will, for the purpose of establishing his claim, and obtaining payment thereof out of the estate. By the bill he prayed an injunction restraining the defendants from taking any further proceedings in the orphans court in regard to the accounts of John and himself, and the exceptions thereto, and from taking or asking for any order or decree of that court touching them, and that the accounts might be stated and settled in the court of chancery, and under its directions, and that all just credits and allowances might be made to him for all moneys due him from the estate, including the claim of \$20,000 and interest. To the bill John filed a separate answer, and Jane Gray the elder, Jane Gray the younger, Isabella Gray, William

Gray v. Gray.

Gray and Maria Green filed their joint and several answer. Evidence was taken in the cause, and it was heard in the court of chancery on the bill, answer, replications and proofs taken on both sides, and the chancellor being of opinion that the complainant was not entitled to the relief prayed for by his bill, by his decree of May 18th, 1880, dismissed the bill and dissolved the injunction which had been issued on the filing thereof. From that decree the complainant appealed to the court of errors and appeals, and the cause was again heard there on its merits, and by decree of July 19th, 1881, that court in all things affirmed the decree appealed from, with costs to be paid by the appellant. In April, 1882, Alexander Gray filed, in the surrogate's office of Middlesex county, what purported to be his amended account, as well of all his receipts as of his disbursements for or on account of the estate. By it he charged himself with nothing, and prayed allowance for \$1,505.32 for disbursements. This account was sworn to by him as in all things just and true, both as to the moneys that had come to his hands, and the disbursements thereof, according to the best of his memory and belief. In that account he did not claim allowance for the claim of \$20,000 and interest (that claim had then been disallowed both by the court of chancery and the court of last resort), and, on the other hand, he did not charge himself with any money whatever received for or on account of the estate.

It appears that in January, 1882, a few months previous to the filing of that so-called amended account, Jane Gray the elder, Jane Gray the younger, Isabella Gray, Benjamin Gray, D. A. Fell and Elizabeth, his wife, filed their petition in the orphans court of Luzerne county, in Pennsylvania, where John and Alexander Gray had taken out letters of administration of the estate in April, 1873, praying that Alexander might be called upon to give an account of the assets which had come to his hands as administrator, and that he might be removed from his office, and that in the meantime he be enjoined from acting in or interfering with any matter pertaining to the estate. By his answer to that petition, filed in February, 1882, he admits that he has in his hands \$11,000, or thereabouts, of the money of the

Gray v. Gray.

estate (the same money with which he charged himself in his first separate account in this state), and he also alleges that he has a just claim against the estate, and denies that there is or has been a determination of the court of chancery of this state, or of any court (the decision of the court of errors and appeals against him had then been rendered ; it was rendered in July, 1881), that his claim was not a proper and legal charge upon the estate. He adds :

“ It is true that your respondent asked the Middlesex orphans court of New Jersey to allow the claim, but it was decided that the court had no jurisdiction over it, and that he did then file a bill in chancery, which was dismissed under the peculiar rules of chancery procedure in New Jersey, but no adjudication of the claim has been made that the same is not a just and legal charge upon the estate.”

This answer is sworn to by Gray himself. He is a practicing lawyer of this state, and had been at the bar here many years when the answer was sworn to. He must have known that the decisions of the court of chancery and of the court of errors and appeals were upon the merits of that claim, as presented by himself in his own suit, brought for the very purpose of establishing it, and that on full investigation of the matter, as the cause was submitted by him, his bill was dismissed because the claim was rejected on the proofs. It appears, also, in an account which he made up and sent, in the spring of 1882, to his lawyer in Pennsylvania as the basis of one to be drawn by the latter to be filed there, he charged himself with \$33,342.95, including the \$11,-624.89 and interest thereon to April 1st, 1882, \$5,207.73, and claimed allowance for \$54,509.15 for principal and interest of the rejected claim. It appears quite clearly that his design was, since his claim had been rejected here, to refuse to account here for the money with which he charged himself in his original separate account in this state, and, by amending his account here, expunge the charge, and then account for the money in Pennsylvania and claim allowance there for the claim. The evidence shows that the money was received in this state. It was due from Joseph Brown, of Pennsylvania, to the estate on a note. The

Davis v. Combs.

amount was placed by Brown to the credit of Gray, as executor, who drew it (living in this state) by check or draft. In his answer, before mentioned, to the petition in the orphans court of Luzerne county, he states that he accounted for that money in his account of 1875 in this state. The facts of the case show a refusal on his part to account for that money in the court in which he is bound to account for it, and in which he has charged himself with it, and a determination on his part to apply it, so far as it will go, and other moneys of the estate which have or may come to his hands, to the payment of the rejected claim, notwithstanding the adverse adjudications thereon which forbid it. It may be added that he asked no permission of the court here to strike out the charge for his account, to the end that he might account for it in Pennsylvania, but has simply filed what he terms an amended account, from which he omits the charge. The conclusion is irresistible that he has wasted and misapplied the estate, and has abused the trust and confidence reposed in him as executor. The decree appealed from will be affirmed, with costs and \$100 counsel fee to be paid by the appellant.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the ordinary in the foregoing opinion.

REBECCA DAVIS, appellant,

v.

JAMES COMBS, respondent.

On appeal from a decree of the ordinary, whose opinion is reported in *Davis v. Combs*, 11 *Stew. Eq.* 473.

Mr. M. H. Stratton, for appellant.

Gardner's Executor v. Gardner.

Mr. Wm. H. Potter, for respondent.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the ordinary.

THE EXECUTOR OF WILLIAM GARDNER, appellant,

v.

GEORGE B. GARDNER et al., respondents.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Gardner v. Gardner*, 10 Stew. Eq. 487.

Mr. James B. Vredenburgh, for appellant.

Mr. M. T. Newbold, for respondents.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the vice-chancellor.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1885.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET AND JOHN T. BIRD, ESQS.,
VICE-CHANCELLORS.

THE CHURCH OF ST. FRANCIS OF ASSISIUM

v.

PETER A. HARGOUS.

A bill sought to set aside a contract for the sale of lands on account of defendant's fraud. There was no evidence of fraud, but defendant had been mistaken as to the deeds conveying title to him. He offered to supply the defects.—*Held*, that he should be allowed a reasonable time to do so, and that failing in that, the contract should be set aside on the ground of mistake.

Bill for relief. On final hearing on pleadings and proofs.

St. Francis Church v. Hargous.

Mr. J. H. Stewart, for complainant.

Mr. C. H. Corbin, for defendant, and defendant *in pro. pers.*

THE CHANCELLOR.

This suit is brought to set aside for fraud an agreement made between the parties on or about March 3d, 1883. The agreement, after reciting that the defendant, as grantee of Eugenia V. Hargous (his mother), sole legatee of Peter A. Hargous (his father), late of the city of New York, deceased, claimed as reversioner certain property on the corner of Market and Lamberton streets, in Trenton, conveyed by his father to the late Bishop Bayley May 24th, 1859, and that the complainant, as grantee of Bishop Bayley, claimed still to be in lawful possession of the premises, declared that, in order to reconcile those opposing claims and arrive at an arrangement satisfactory to both parties, and in consideration of \$1, the parties agreed as follows: That the defendant should, on or before the 24th of March, 1883, convey to the complainant all his right, title and interest to the property, and that the complainant should thereupon execute and deliver to him at the same time a warranty deed for an undivided half part of those premises and of the adjoining lot on the easterly side thereof, being twenty-five feet in front on Market street, and one hundred and sixty feet deep, making the conveyance for one undivided half of the whole plot of ground eighty-five feet on the southerly side of Market street and one hundred and sixty feet on the easterly side of Lamberton street. And the complainant thereby covenanted and agreed with the defendant that the property would be free and clear of all encumbrances at the time of the execution of that deed. And it was thereby further agreed that the dead bodies then in the burial-ground on the plot should be removed therefrom by the complainant, and that the reasonable expense thereof should be paid by it and charged to the joint account of the ownership of the land, and one-half thereof allowed to the complainant out of the proceeds of the sale of the premises; that the contract for the work of removing those bodies should be given to Peter J. Har-

St. Francis Church v. Hargous.

gous, of Trenton, at such reasonable compensation therefor as should be agreed upon between him and the complainant, and that the complainant, in the event of the old church on the property being taken down, should preserve the corner-stone thereof and set it up in some conspicuous place in the complainant's church, or such church as it might thereafter own, and place thereon some suitable inscription to memorialize the old church so taken down. And it was thereby further agreed that upon the execution and delivery of the deed therein provided for, the parties to the agreement should use their best endeavor to sell and dispose of the property to the best advantage, and should agree upon a proper plan to advance the sale, and that all proceeds therefrom should be divided equally between them, their legal representatives or assigns, after deducting all lawful expenses incurred or which might be incurred therefor. On the same day on which that agreement was made the complainant made a contract with Peter J. Hargous to remove the dead bodies for the consideration of \$1,000 to be paid by it to him, of which sum it was to pay him, in weekly payments, so much as might be necessary to pay the expenses of the work, and the balance it was to pay him from the proceeds of the sale of the property. He did the work and received from the complainant \$400 on account of the contract. He also received \$200 more thereon, the amount for which the complainant sold the old church building, and which was paid to him.

The complainant alleges that the defendant falsely claimed that he was entitled to the property conveyed by his father to Bishop Bayley, because, as it insists, the property, notwithstanding the provision for reversion in that deed, was not in fact subject thereto, inasmuch as it was, when the defendant's father bought it, subject to a trust by which it was devoted to church uses, and therefore when he conveyed it to Bishop Bayley, on condition that it should be devoted to, and only to, the uses and purposes of Divine worship according to the rules and discipline of the Roman Catholic Church, or for the purposes of a burial-ground, school-house and parsonage attached to the church, and provided for a reversion to himself and his heirs and assigns on

St. Francis Church v. Hargous.

breach of the condition, he had no lawful right to such reversion. It also charges that the defendant falsely and fraudulently claimed that he was the sole owner of such reversion, whereas, if it existed at all, he could only convey an estate therein for his mother's life. His father, by his will, gave the reversionary interest to her for life only, with power to appoint it after her death to and among his children or their descendants, and provided that in default of such appointment, it should go to his children in equal shares, with substitution of the descendants of any that should have died in the place of the decedent or decedents. The bill also charges that the defendant fraudulently sought to induce the complainant to remove the dead bodies and the church building from the property, so as to break the condition and thus give those claiming under his father's will a claim to the property under the reversionary provision in the deed. The complainant also alleges that the written agreement between the parties, which was drawn by the defendant, was not in accordance with the understanding between them, but the bill does not state in what respects it differed. The bill prays that the agreement may be set aside, and that the defendant may be decreed to pay the complainant the \$400 paid to Peter J. Hargous by the complainant, and the \$200 received by him on account of his contract from the sale of the church building.

The claim that the property was not subject to the provision for reversion contained in the deed from the defendant's father to Bishop Bayley is, as before stated, based on the allegation that the property was subject, in the hands of the grantor at the time of that conveyance, to a dedication to the same uses to which, by that deed, it was devoted. This claim is founded upon the following facts: Daniel W. Coxe, for the consideration of \$420, conveyed the property September 30th, 1816, by deed of bargain and sale, with the usual covenants, to "John B. Sartori, president of St. John's Church of West Jersey, in trust for the Roman Catholic congregation." That church was not then incorporated. There was at that time no Roman Catholic diocese in

St. Francis Church v. Hargous.

this state, nor any Roman Catholic bishop to take the title to church property. The deed was recorded and a church edifice was built on the lot for St. John's Church, and the property was used as a place of worship and a burial-place by and for that church for many years. On October 1st, 1816, Sartori, as president of the church, gave a mortgage on the premises to Coxe, which is still uncanceled. On February 1st, 1825, Sartori, as such president, gave another mortgage on the property to Rebecca Bettini. In that instrument the premises were not only particularly described, but were designated as a church and lot. On January 16th, 1832, Sartori, styling himself "formerly president" of the church (St. John's) conveyed the property to Archbishop Kenrick, of Philadelphia, in "trust for the Roman Catholic congregation of St. John's Church, of West New Jersey." On May 8th, 1839, the property was conveyed by the sheriff to William Skeen, pursuant to a sale under an execution out of this court on a decree of foreclosure of the Bettini mortgage. Pursuant to a sale under an execution on a judgment at law against Skeen, the property was conveyed by the sheriff in June, 1843, to Joseph B. Kennedy, who in July following conveyed it to Alexander C. M. Pennington, who conveyed it in November, 1847, to William Halsted, who, in February, 1848, conveyed it to Peter A. Hargous, the defendant's father, and he, in 1859, conveyed it as before mentioned to Bishop Bayley, who, in October, 1864, conveyed it to the complainant by the deed already referred to.

The legal title to the property, it will be seen, was in Sartori, who, as he lawfully could do, mortgaged it as president of the church. The church was not then incorporated. Had it then been a corporation and the title been in it, it could have made a valid mortgage of the premises, and a sale under it would have passed to the purchaser a title free from the trust. *Magie v. German Evangelical Church*, 2 Beas. 77; affirmed on appeal, 2 McCart. 500. Peter A. Hargous, the defendant's father, had title to the property clear of the trust. Moreover, it may be remarked, the trust to which the property was subject in Sartori's hands was in favor of St. John's Church. The complainant is not that church

St. Francis Church v. Hargous.

but another, a corporation created in September, 1864, and has no title, legal or equitable, to the property, except what it derives under the deed from Hargous to Bishop Bayley. There is therefore no substance in the complainant's claim that Hargous had no right to provide for a reversion of the premises on breach of the condition contained in his deed to Bishop Bayley, nor is there any ground for it.

But further, the misrepresentation complained of was not in reference to the fact of the existence of the reversionary interest. The complainant does not allege that the defendant falsely represented that there was a claim to reversion when in fact none existed. The fact that there was such a claim was known to the complainant before any of its officers saw or communicated with the defendant on the subject. It appeared on the face of the deed under which the complainant derived its title. Before the making of the application to the defendant, which was made in November, 1882, from which the agreement in question resulted, the complainant contemplated diverting the land from the uses to which it was devoted to sell it for its own benefit. As early as 1875 it obtained permission from the bishop of the diocese to tear down the church building and dispose of the property. When the agreement was made the complainant was desirous of selling the property. The building and fences on it had fallen into dilapidation. Rev. Mr. Ellison, the priest of St. Francis Church, and *ex officio* one of the trustees, testifies that the complainant wanted to sell the property. He says the object was to abate a nuisance and to utilize what was given for charitable purposes. All the propositions made on behalf of the complainant preceding the agreement were made with a view to selling the property. Nor could it be justly held that in the making of the agreement the complainant was *inops consilii*. It had counsel. In February preceding its solicitor had filed a bill in this court against the defendant's mother, to quiet title in respect to this very claim of reversion, and that suit was pending. The bill was not dismissed until March 2d, 1883. In January preceding, Mr. Ellison read the will with reference to this very

St. Francis Church v. Hargous.

claim (for neither he nor the complainant had any other interest affected by it), in the surrogate's office in the city of New York.

There can be no doubt from the evidence that the agreement was the result of an application made on the part of the complainant to the defendant with a view to an amicable arrangement by which both the Hargous family and the church might receive benefit from the sale of the property on joint account. Not to speak particularly of an application made about a year previously to the defendant on behalf of the church, one was made to him in the city of New York, in November, 1882, for a release as a gratuity to the church. This proposition was declined, and in the latter part of February in the next year there was an interview between the defendant and Mr. Ellison and another member of the board of trustees, at which three propositions were made on the part of the complainant. The first was that the complainant should pay the defendant \$1,500 for a quit-claim from the family. This was declined. The second, that the dead bodies should be removed from the property at joint expense, and the property be then sold and the proceeds equally divided between the parties. This also was declined. The third was that the defendant should pay the complainant \$1,500 for its interest in or claim to the property. This, too, the defendant declined to accept. He thereupon himself made three propositions. The first was that the complainant should pay him \$3,500 for the interest of the reversioners. This was declined. The second, that the complainant should remove the dead bodies at its expense, and then sell the property and pay him half of the proceeds of the sale. This, too, was declined. The third was that the complainant should put into joint account an adjoining lot of twenty-five feet front by one hundred and sixty feet in depth, of which the complainant claimed to be the owner, and remove the bodies at joint expense, and then sell the property and divide the proceeds equally between the parties. This was accepted. It was understood that the defendant was to draw the agreement, and he did so. The bill, as before stated, alleges that as drawn it varied from the verbal contract, but it does not specify wherein it differed. By the evidence on the

St. Francis Church v. Hargous.

part of the complainant itself it appears that it was drawn in exact conformity with the verbal agreement, except that, as Mr. Ellison declares, the provision for a conveyance by the complainant to the defendant of half of the two lots was not part of the verbal contract. But the defendant swears that it was, and it is clear that any misunderstanding between them on that head must be attributed entirely to a misapprehension on the part of Mr. Ellison of the meaning of the language used by the defendant, for in his telegram of the 4th of April he says:

“We are ready to deliver you by Saturday warranty deed spoken of in agreement, but want you to deliver us quit-claim deed as spoken of in agreement.”

He thus declares that the complainant is ready to deliver the deed in question. Moreover he himself drew a deed—the deed referred to in his telegram—from the complainant to the defendant, granting, bargaining and selling to him “and to his successors and assigns one undivided half part” of the two lots of land, describing them. This deed was, for an obvious reason, not satisfactory to the defendant. The conveyance was without words of inheritance, and was otherwise informal.

It would seem that Mr. Ellison understood what was meant by the provision for a deed in the agreement, for he drew that deed to comply with it. He swears, however, that the verbal agreement was that the complainant should give the appellant “a kind of warranty for the half of the proceeds of the sale of the land.” He says, also, that he supposed that the effect of the deed he himself drew was merely to give the defendant security that he would receive half of the proceeds of sale. It is enough to say that if there was any misunderstanding on this subject, it arose entirely from Mr. Ellison’s want of apprehension as to the plain meaning, not only of words which the defendant used in the agreement, but those which he himself employed in the deed which he drew in accordance with the agreement. It would appear that the provision for a warranty deed for land would be primarily understood by any one to signify precisely what the language imports—a conveyance of the land itself, and not merely a covenant to pay over the proceeds of the sale to the

St. Francis Church v. Hargous.

grantee. He does not, however, in fact, allege that the agreement differed from the verbal understanding, but that he understood, by the words used in both in reference to the deed to the defendant, that they meant something else than what they plainly imported. It may be added that the other trustee, Mr. Greenwald, who was present at the making of the verbal agreement, gave no testimony on the subject of the alleged variance. There is obviously no ground for a claim to relief on this head.

But it is urged that the defendant fraudulently pretended that he was the owner of the entire interest of the Hargous family, under the reversion, while, in fact, he had only his mother's life estate, and whatever interest he might have been entitled to under his father's will as one of the children. By the will, the testator gives to his wife, in fee, certain real property in the city of New York, and gives to her absolutely certain personal property also, and then gives to her all the residue of his estate for life, with power to appoint it by will, or instrument in the nature thereof, among his children, or to their descendants, in such shares as she shall think proper, and in default of such appointment gives it to his children, living at her death, in equal shares, the descendant or descendants of any deceased child to take the share which such deceased child would have taken if living; and he authorizes her to advance, with the consent of his executors, to any of his children of lawful age, such part of the share which such child would be entitled to under the will if living at the death of his wife, in default of any appointment by her, as she and his executors may think discreet. He then gives to his executors or such other person or persons as shall, by law, be appointed to administer upon his estate, full power and authority, by and with the consent of his wife, to sell and convey all or any part of his real estate, upon such terms and in such manner as they may deem advisable. He appointed his wife and his brother, Louis E. Hargous, executors. The will was proved in New York in 1866, by Louis E. Hargous, but has not been proved in this state. By deed dated March 9th, 1881, the widow conveyed her interest in the church property to the defendant. When he made the agreement he held no other title than that, except

St. Francis Church v. Hargous.

his interest under the will as one of the children. By the agreement, he agreed to convey all his right, title and interest to the property. He then supposed that under and by virtue of the conveyance from his mother he held a complete title, and the complainant's trustees also understood that his title was complete. That deed was not recorded until January, 1883. It was acknowledged according to the requirements of the laws of New York, but was not properly acknowledged to be recorded in this state. It went on record, however, nevertheless. It stated that Mr. Hargous was sole legatee [devisee] under the will. In the spring of 1883, the defendant ascertained that it passed only a life estate, and he then got a deed from the executors—both of them—to him for the property. That deed was acknowledged in the same way as the other, and, like it, was recorded here notwithstanding the defect in the acknowledgment. The defendant says he intended, by his agreement, to stipulate to pass a complete title to the reversionary interest, and thought he then had it; that no objection was ever made to his title on any specific ground; that if there had been, he would have supplied the defect, and that he can now convey a good title, and is ready to fulfill the agreement on his part whenever the complainant is prepared to perform it. It is worthy of remark here that the complainant, at the time of making the agreement, had no title, as it subsequently ascertained, to the lot adjoining the church lot, and did not get one until April, 1883. The allegations of fraud made in the bill against the defendant, though numerous and vigorously made, are in no wise sustained, and are groundless. He does not appear to have acted unfairly in any way. The charge that he took advantage of his legal knowledge and the confidence reposed in him by Messrs. Ellison and Greenwald because he was a Roman Catholic, is wholly unsupported by the evidence. And here it will not be out of place to refer to the fact that stress is laid by the complainant on the omission by the defendant to acknowledge the agreement. Because of this omission the complainant could not put it upon record, and it is urged that the omission is cogent evidence of fraud on the part of the defendant. But there is no evidence of

St. Francis Church v. Hargous.

fraud in that. He was under no obligation to acknowledge it, especially in the absence of any request to do so. The fact is that he drew the agreement, and sent the draft of it to Mr. Ellison. Having learned that it was satisfactory, he went to Trenton and signed one of the two papers (he had drawn the agreement in duplicate) and left it with Mr. Ellison, with the understanding that it was to be signed by the other parties, and sent to him, and that he was then, in return, to send them the other signed by himself. He afterwards sent the latter paper duly signed by himself, with a request that they would sign it, and return it to him, but neither paper was ever sent to him, and no reason was given him for not complying with the promise to send him one of them.

Nor is the complainant, as the case now stands, entitled to any relief on the ground of mistake. Both parties were mistaken when the agreement was made, each as to his or its title. The time fixed by the agreement for the delivery of the deeds was the 24th of March, 1883. At that time neither party was ready to carry out the agreement. The complainant had no title to the lot adjoining the church lot, and the defendant had only his mother's life estate and his own interest as one of the children in the reversionary interest in the latter property. Both parties acquiesced in postponing the delivery of the deeds. On the 4th of April, 1884, Mr. Ellison telegraphed that the complainant would be ready to deliver its deed on the ensuing Saturday. By letter of the next day the complainant's attorney requested the defendant to furnish a copy of his deed and a copy of the will, to enable the former to pass upon the title. The request was complied with at once, but the defendant did not hear further from the matter until the bill in this cause was filed, which was on the 18th of the very next month. The suit, it may be remarked, is not brought to rescind the agreement, but to set it aside for fraud.

The defendant was, indeed, mistaken as to the extent of his title, but he proceeded, as soon as he ascertained the fact, to obtain a complete title, and he succeeded. The deed from the executors to him was acknowledged on the 12th of March, 1883;

Williams v. Champion.

so that he had title to the property then. The reversionary interest passed by the will (*Rev. p. 167* § 82), and the executors had power to sell with the widow's consent, and she joined with her co-executor in that deed. But the evidences of the defendant's title were not satisfactory. The complainant should have pointed out to him the defects and given him an opportunity to remedy them. It did not do so, but appears to have concluded that his conduct in the whole matter was fraudulent, and, without warning to him, began this suit. The evidences of his title are not such as that the complainant should have been required to accept them, but he says he can and will supply the defects, and there appears to be no reason to doubt his ability or to question his sincerity. He should have an opportunity to fulfill his contract according to his and the complainant's understanding of it; that is, he should have an opportunity to tender satisfactory conveyance to the complainant of the entire reversionary interest. If he does not do so within a reasonable period, the agreement should be set aside on the ground of mistake. The question of costs is reserved.

LEWIS S. WILLIAMS

v.

NATHAN CHAMPION.

A mortgage for about \$1,500 was given to the defendant to secure a bond containing a warrant of attorney to confess judgment thereon. After it became due, and was, with the interest, unpaid, the defendant entered a judgment by confession on the bond, in the supreme court, and issued an execution thereon. The complainant, the mortgagor's brother, in order to aid him, conveyed with him to the defendant, pursuant to an agreement between the complainant and defendant, certain cedar swamps owned by him and his brother, and the consideration thereof was credited on the bond. He also, under the agreement, obtained from his brother a deed for the undivided one-half of another tract of land, likewise owned by them in common, and known as the Tin Shop Lot, on the brother's interest in which the judgment was a

Williams v. Champion.

lien, and then gave the defendant a mortgage thereon for \$150, which complainant afterwards paid on account of the \$1,500 mortgage. Subsequently, the defendant foreclosed his \$1,500 mortgage, and after the sale there remained a deficiency.—*Held*, that under the circumstances the defendant should be enjoined (on the ground of equitable estoppel and waiver) from collecting this deficiency out of the Tin Shop Lot, which defendant now claims the right to do by virtue of his lien, under his execution on the confessed judgment, on complainant's brother's interest in the tin shop lot before its conveyance to complainant.

Bill for relief. On final hearing on pleadings and proofs.

Mr. E. B. Leaming, for complainant.

Mr. J. B. Huffman, for defendant.

THE CHANCELLOR.

The defendant, Nathan Champion, held a mortgage given to him by John M. Williams and wife, and dated September 1st, 1874, on certain land in Cape May county, to secure the payment of Williams's bond to the defendant for \$1,544.68, besides interest. There was a warrant of attorney to confess judgment on the bond annexed to that instrument. The principal became due September 1st, 1875. It and the interest being due and unpaid, the defendant caused judgment to be entered in the supreme court on the bond, pursuant to the warrant of attorney, on the 16th of June, 1877, for the penalty of the bond, and issued execution thereon to the sheriff of Cape May. No interest had ever been paid on the bond. The sheriff, after he received the execution, called upon the complainant, Lewis S. Williams (who lived in Salem county), brother of John M. Williams, who lived in Missouri. The complainant, according to his testimony, desired to obtain further time for his brother to pay the money, and called on the defendant for the purpose. He, the complainant, proposed an arrangement for the payment of the interest in arrear and the interest for a year more, or thereabouts. The arrangement was that he and his brother should together give the defendant a deed for a certain cedar swamp meadow, of which they each owned an undivided half, for the consideration

Williams v. Champion.

of \$270, to be credited on the bond, and that he would get his brother (John) to convey to him his interest in another property called the Tin Shop Property, which they held in like manner, and that he would then give the defendant his bond conditioned for the payment of \$150 and interest, in consideration of which that amount also was to be credited for interest on the before-mentioned mortgage; the payment of that bond to be secured by a mortgage to be given by the complainant to the defendant on the Tin Shop Property. Neither the cedar swamp meadow nor the Tin Shop Lot was included in the mortgage from John to the defendant. This arrangement so made by the complainant for the payment of the \$420 on account of the interest, was agreed to by the defendant, and was carried out by the complainant. He and John conveyed the cedar swamp lot to the defendant, and John conveyed to the complainant his half of the Tin Shop Lot, and then the complainant and his wife gave to the defendant a mortgage on the whole property for \$150 and interest, and a receipt was then endorsed on John's bond, under date of September 1st, 1877, and signed by the defendant, for \$420 interest. The complainant paid off the \$150 mortgage in 1879. The defendant, by proceedings begun in 1881, foreclosed the first-mentioned mortgage (John's) and sold the mortgaged premises. There was a deficiency of \$628.44. To raise this he proceeded to sell under an execution issued on the judgment at law. The execution was endorsed with a direction to raise the sum of \$1,845.63 debt, and \$5.50 costs, with interest from June 16th, 1877. It is stated by the bill and admitted by the answer, that the true amount of the debt is not \$1,845.63, but \$628.44. The defendant was, when the bill was filed, proceeding to sell under the execution the undivided half (formerly John's) of the Tin Shop Lot, and the bill was filed to restrain him.

The defendant, by his answer, which is sworn to, denies that there was any agreement between him and the complainant that the latter should obtain a conveyance of John's interest in the Tin Shop Lot before giving the mortgage for \$150, and says that he never understood that that mortgage was to cover anything

Williams v. Champion.

more than the complainant's interest in that property. He swears to the same thing in his testimony, but in the latter he also says that the mortgage was given for money, \$150, lent by him to the complainant, and that he does not remember how the \$150 balance of the \$420 interest was paid. He also says that the complainant came to see him about the interest, about September 11th, 1877. The weight of the evidence is in support of the allegations of the bill on this subject. In the first place, the transaction did not take place on the 11th of September, but in August, as the complainant swears it did. The receipt for the interest is dated September 1st. The deed for the cedar swamp meadow is dated and was acknowledged August 13th, and the \$150 mortgage is dated and was acknowledged August 21st. Again, the defendant's memory is not good. Not only can he not remember how \$150 of the \$420 interest were paid, but he swears that the \$150 mortgage was given by the complainant to secure the payment of a loan from him. The complainant paid off the \$150 mortgage in the summer of 1879, with money he borrowed from a masonic lodge. Reuben S. Robinson. testifies that the last of June or 1st of July of that year, the defendant said to him that the complainant owned the Tin Shop Property, and that he, the defendant, had no further claim against it.

William B. Brown testifies that after the property was advertised for sale under the execution, the defendant told him that he did not know it was advertised and had never given any order to have it advertised, and that he had no claim against it. Thomas L. Russell says that soon after the complainant borrowed the money of the lodge to pay the mortgage, the defendant told him the property was clear. Robert M. Dare swears that about two years and a half before the time when he gave his testimony, which was in the summer of 1884, the defendant told him that he had nothing against the Tin Shop Lot, or had no claim upon it. The defendant, while he denies that he made these statements, seems to have no recollection of the conversations at all. He says he might have said to these witnesses that he had no claim on the complainant's interest in the property, and that the prop-

Williams v. Champion.

erty was clear, so far as that interest was concerned. It is worthy of remark that the \$150 mortgage was not given upon an undivided half of the property but upon the whole. The defendant is a very old man. He is eighty-two years old. His memory has undoubtedly failed. The weight of the testimony is clearly with the complainant.

If the defendant agreed with the complainant that the former should obtain a conveyance of his brother's interest in the property and then give a mortgage on the whole to the defendant for \$150, for his brother's debt to the latter, and that arrangement was carried out by the complainant accordingly, it is clear that the defendant, under the circumstances, ought to be restrained in equity from selling, under the judgment, the interest which James then had in the property. The lot was not worth over \$325 or \$350; so that the complainant in paying as he did \$150 for his brother's interest in it, in fact paid full value for it, or very nearly so. The complainant swears that he did not, when he made the arrangement with the defendant, know of the existence of the judgment and never knew or had any intimation of its existence until June, 1883. It is true the sheriff swears he told the complainant that he had an execution against his brother, but the complainant swears that he did not so understand him, and that he understood from what he said that the defendant was about to foreclose the mortgage which John had given him. This is by no means improbable. The defendant, knowing that he had a lien by virtue of his judgment on the property, agreed with the complainant, who was ignorant of the existence of the lien, that the latter should (in effect) buy that property from his brother, in order, and merely in order, to pay the purchase-money to the defendant on account of the judgment debt. The defendant did not mention the fact that he had such lien, and the complainant took the conveyance and paid the consideration to the defendant in ignorance of it. The latter will be estopped in equity from enforcing his lien on the property under the judgment, and he will be enjoined accordingly. His conduct was, under the circumstances, in equity, a waiver of his lien. If it be regarded as proved that the complainant did, in

 Kirchner v. Miller.

fact, know of the existence of the judgment and the lien which it created on the property, the result is the same. The defendant would still be held, in equity, to have waived his lien. He is estopped by his silence.

LORENZ KIRCHNER

v.

LE GRAND MILLER.

The complainant and defendant were the owners of adjoining town lots. The complainant employed a surveyor to fix the dividing line between the lots, which the surveyor, by mistake, mislocated, and thereupon complainant, supposing that he was building upon his own land, inadvertently placed a small part of his house a few inches over on defendant's lot, the defendant being also then unaware of the encroachment.—*Held*, that equity would not enjoin an action of ejectment by defendant against complainant to recover possession of the strip so built upon.

Bill for relief. On final hearing on pleadings and proofs.

NOTE.—Under what circumstances an owner of land has been adjudged to be estopped by his silence or acquiescence, through ignorance or forgetfulness or mistake, in an adjoining land-owner's building over on his premises, is elaborately discussed in *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th Am. ed.) 888, et seq.; *Bigelow on Estoppel* 528; see, also, *Short v. Taylor*, 2 *Eq. Cas. Abr.* 522; *East India Co. v. Vincent*, 2 *Atk.* 83; *Slim v. Croucher*, 1 *De G., F. & J.* 518; *Mold v. Wheatecroft*, 27 *Beav.* 510; *Rex v. Butterton*, 6 *T. R.* 554, 556; *Tarrant v. Terry*, 1 *Bay* 239; *Brant v. Virginia Coal and Iron Co.*, 93 *U. S.* 326; *Cronin v. Gore*, 38 *Mich.* 381; *Sulphine v. Dunbar*, 55 *Miss.* 255; *Weber v. Weatherby*, 34 *Md.* 656; *Hall v. Fisher*, 9 *Barb.* 17, 31; *Laurence v. Luhr*, 65 *Pa. St.* 236; *Viele v. Judson*, 82 *N. Y.* 32; *Raynor v. Timerson*, 54 *N. Y.* 639; *Miller v. Platt*, 5 *Duer* 272 (an important case); *Tilton v. Nelson*, 27 *Barb.* 594, 608; *Christianson v. Linford*, 3 *Robt. (N. Y.)* 215, 19 *Abb. Pr.* 221; *McAfferty v. Conover*, 7 *Ohio St.* 99; *Robinson v. Justice*, 2 *Pa.* 18; *Woods v. Wilson*, 37 *Pa. St.* 379; *Gove v. White*, 23 *Wis.* 282; *Jordan v. Deaton*, 23 *Ark.* 704; *Godeffroy v. Culdwell*, 2 *Cal.* 489; *Ferris v. Coover*, 10 *Cal.* 589,

Kirchner v. Miller.

Mr. S. C. Mount, for complainant.

Mr. A. S. Cloke, for defendant.

THE CHANCELLOR.

The parties to this suit are the owners of adjoining lots of land in that part of Jersey City known as Greenville. The lots are each of the dimensions of twenty-five feet front. The complainant, desiring to build an extension to the house on his lot, and wishing to build up to, or nearly up to, the line between his lot and the defendant's, employed a competent surveyor to locate the line. The surveyor located it accordingly, driving stakes to show where it was. One of these was at the front. The complainant built the extension nearly up to the line. About a year after it was finished, it was discovered that it occupied a small piece, four or five inches wide, by fifteen feet deep, of the defendant's lot. The surveyor had made a mistake in fixing the line, and had located it six and a half inches too far west, and to that extent on the defendant's land. The defendant brought an action of ejectment in the Supreme Court to recover possession of that strip, and the bill in this cause was filed for an injunction to restrain him from prosecuting that suit and for other equitable relief. The fact that the complainant was very care-

631; *Crest v. Jack*, 3 Watts 238; *Hefner v. Downing*, 57 Tex. 576; *Walker v. Flint*, 3 McCrary 507; *Georgia R. R. v. Hamilton*, 59 Ga. 171; *Steele v. Smelting Co.*, 106 U. S. 447; *Odlin v. Gore*, 41 N. H. 465; 12 Cent. L. J. 29.

In *Proctor v. Putnam Machine Co.* (Mass.), 18 Rep. 51, defendant's agents told plaintiff that defendant proposed to build a heavy wall on its own land, and at its own expense, and requested the plaintiff to unite with them in ascertaining the true boundary line between their lots; plaintiff replied that a surveyor had once surveyed the land, and could, therefore, fix this line, but that he was absent from home; plaintiff finally agreed that that surveyor's assistant should make use of the surveyor's notes, and that the wall should be built on the line so fixed by the assistant. The wall was built, and it was afterwards found to be wholly on plaintiff's land.—*Held*, that plaintiff was not estopped from recovering the land covered by the wall, if he had acted without fraudulent intent in regard to the true line between the parties, although under a mistake of fact.

In *Acton v. Dooley*, 6 Mo. App. 323, 74 Mo. 63, plaintiff and defendant be-

Kirchner v. Miller.

ful and circumspect in locating the line before beginning to build the extension, is clearly proved, and indeed is not denied. Nor is it denied that the defendant knew, while the extension was being built, that the complainant was building his extension there. The answer says that he believed, at the time of the erection of the extension, that it was upon the true line dividing the two lots, and that he had no suspicion whatever that the complainant was encroaching upon his lot; and it admits that, as charged in the bill, he did not object to the erection of the building. It alleges that the complainant can remove that part of the building which is on the defendant's lot for \$75. The complainant, after he discovered that the building encroached on the defendant's lot, offered in settlement to buy the strip or give the defendant a strip of equal width from the lot adjoining on the other side. Both these offers were declined. The defendant, however, offered to settle the matter by selling his whole property to the complainant for \$2,200, or by leasing the strip to him at the rent of \$60 a year. The strip was probably worth not over \$50. The defendant admits that the loss of that strip from the lot would be no injury to his house, but he says it would reduce the value of the lot \$150. The lot, without the building on it, is not worth over \$500 or \$600. The fact of the encroachment was not discovered until the parties got into a con-

came the owners of adjoining twenty-five-foot lots; the former in 1865, the latter in 1866. Defendant soon afterwards, desiring to build, had his lot surveyed, but plaintiff was not notified of, and took no part in the survey, which, by mistake, included a strip four and one-half inches wide, and one hundred and fifty-five feet deep. Defendant built his house on the surveyed line, and also a fence thereon in the rear of his house. Plaintiff afterwards measured twenty-five feet from the western line (the division line) of this survey, and located the western line of his own lot therefrom. He built a house on this western line of his lot, and it was completed before defendant's house. Defendant had no knowledge of the mode by which plaintiff had located the west line of his lot, nor that plaintiff had built on that line. Plaintiff, by permission, used defendant's west fence as part of his coal-shed. Some time afterwards he complained that defendant's cornice projected over his lot, and it was thereupon removed. In 1875 a new survey was made, and plaintiff then first discovered defendant's encroachment.—*Held*, that plaintiff was not estopped from recovering the strip in ejectment.—*REP*.

Kirchner v. Miller.

troversy about the true location of a fence subsequently built by the defendant on the rear of the lot.

The complainant's counsel insists that the principle of the decision in *McKelway v. Armour*, 2 Stock. 115, is applicable to this case. There, McKelway had by mistake built on Armour's lot instead of his own, which adjoined it. Armour supposed McKelway was building on his own property, and did not suspect that he was, in fact, building on his. It was held that McKelway was entitled to relief, and that Armour must buy the improvements at a valuation to be fixed by this court, or convey his lot to McKelway at a valuation to be fixed in like manner, or upon receiving a conveyance of another adjoining lot of the same size, and in fact, more valuable than his. In that case the improvements were a valuable dwelling-house, and McKelway would, if the court had refused relief, have been subjected to a large loss.

Although in that case Armour saw McKelway building on his land, he did not know or suspect that the building was being erected on his land, but supposed it was being built on McKelway's land. The decision seems to have been based on the ground of mutual mistake. The court, in fact, compelled Armour, who was in nowise in the wrong, to sell his property to McKelway at a price to be fixed by the court, or to exchange properties with McKelway, or to pay for the improvements which McKelway had put on his, Armour's, lot, although they had been so put on that lot, not only without Armour's knowledge, but without any suspicion on his part that McKelway was putting them on his, Armour's, property. The principle of the case is that where one by mistake puts improvements on another's land, mistaking it for his own, equity will, in a proper case, compel the latter to sell and convey the land to the former, at a price to be fixed by the court, unless he will consent to pay for the improvements. The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it.

Kirchner v. Miller.

In *McKelway v. Armour*, the defendant was, by judicial compulsion, forced to sell his land to the complainant merely because the latter had, by his own mistake, put valuable improvements upon it, supposing it to be his own. The alternative given to the defendant—the terms on which alone he was allowed to hold his own property—was to pay for those improvements. Sir William Grant, M. R., says in *Pilling v. Armitage*, 12 Ves. 78, 84: “There are different positions in the books with regard to the sort of equity arising from laying out money upon another’s estate through inadvertence or mistake; that person seeing that, and not interfering to put the party upon his guard. The case, with reference to which that proposition is ordinarily stated, is that of building upon another man’s ground. That is a case which supposes a total absence of title on the one side; implying, therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected that the party should advise the other that he is acting under a mistake.” And on this subject Judge Story says in *Bright v. Boyd*, 1 Story C. C. 478, 493, quoting the above with approval, that the duty of compensation in such cases, at least to the extent of the permanent increase of value, is founded upon the constructive fraud, or gross negligence or delusive confidence held out by the owner; and he holds that the maxim *Qui tacet, consentire videtur; qui potest et debet vetare, jubet si non vetat*, is applicable. “In order to justify the application of the principle,” says Mr. Kerr, “it is indispensable that the party standing by should be fully apprised of his rights, and should, by his conduct, encourage the other party to alter his condition, and that the latter should act on the faith of the encouragement so held out.” *Kerr on F. & M.* 132. “It will be observed,” said Lord Cranworth, in *Ramsden v. Dyson*, L. R. (1 H. of L.) 129, 141, “that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.” To the same effect are remarks of Lord Wensleydale, in the same case.

Kirchner v. Miller.

To warrant the interference of equity in favor and upon the application of the person who has expended his money upon another's land, there must obviously be some hardship against which he ought in conscience to be protected; as that through his mistake he has expended money upon another's land, of which that other ought not, under the circumstances, to have the benefit. Where there is no hardship there is no ground for interference. This case is not one for the application of the doctrine. In *McKelway v. Armour*, the complainant had built a valuable dwelling-house upon the defendant's land, which he must lose unless the court granted him relief. Here there is no hardship to justify a call upon equity for relief. If the defendant be not restrained from proceeding with his action of ejectment, the complainant must remove from the defendant's land the part of his building (a wooden one) which is thereon, viz., a piece of about five inches wide by fifteen feet long. The building does not occupy the whole width of the strip. The complainant says he built up to within an inch and a half or two inches of the line. The extension is between twelve and thirteen feet wide, and is two stories high. The cost of removing the part which is on the defendant's land, and closing up the side again, would not exceed \$100. The complainant's claim is that inasmuch as he, misled by the mistake of the surveyor, honestly but mistakenly assumed that he was the owner of a strip of land which in fact belonged to the defendant, and consequently built a part of his house on it, he is, on that state of facts alone, although the defendant neither did nor said anything to confirm him in his mistake, and in fact did not know that there was a mistake, entitled in equity to a decree that the defendant convey the land to him at a price to be fixed by the court, or accept land on the other side of his lot in exchange for it. To state the claim is to demonstrate its untenable character.

It is true the complainant's wife testifies that a short time after the survey was made, she showed the stakes to the defendant, saying, "See what a piece of your ground we take!" But she says she did not suppose that the stake was over the true line, or that they were encroaching upon the defendant's land. It is

New York and Greenwood Lake R. R. Co. v. Stanley.

admitted that none of the parties knew or suspected that the survey was incorrect. The complainant claimed the land up to the line given him by the surveyor, and the defendant, having no knowledge or suspicion that the claim was not correct, did not gainsay it. It is very important that in applying the principle above considered, care should be taken that the rights of property be not infringed upon without adequate reason to justify it. The bill will be dismissed, with costs.

THE NEW YORK AND GREENWOOD LAKE RAILROAD COM-
PANY

v.

THE HEIRS OF HENRY STANLEY.

A master was directed to ascertain and report the value of certain lands taken by a railroad company for its right of way, and the consequent damage to the owner's adjacent lands, as of the time when the company took the land.—*Held*, that the land covered by a public road, which was laid out through the land taken by the company, after the company had taken it, should not be excepted.

On exceptions to master's report.

Messrs. C. & R. Wayne Parker, for exceptants.

Mr. S. G. Potts and *Mr. W. I. Shreve*, *contra*.

THE CHANCELLOR.

By the order of reference it was referred to the master to take testimony, ascertain and report to the court as to the following matters: the value of the land taken by the railroad company for its right of way, and the amount of the damages done to the adjacent lands of the defendants by the taking of that land, and also the cost of making and maintaining the fences; and

New York and Greenwood Lake R. R. Co. v. Stanley.

he was directed to assess those items of value of land and damages as of the time when the land was taken, and of the cost of the fence as of the time when the fence was made, and allow interest at the legal rate from those times, respectively, to the date of his report. To his report the complainant excepts, on the ground that the amount he has reported as the value of the land taken and for the damages is excessive, and that in making the estimate of the former, he has not excepted part of the land which has been taken for a public road, but has allowed the defendants compensation therefor; and also because he has allowed for fencing on the east side of the land taken for the right of way, although no fence has ever been erected there.

The order of reference requested him to report the value of the land as of the time when the land was taken, which was in or about February, 1870. The public road above mentioned was not laid out until 1871 or 1872. The master did right in conforming his report to the requirements of the order. The exception taken on the ground that he did not exclude the land taken for the road, must therefore be overruled.

Nor can the other exceptions be sustained. The estimates in the evidence of the value of the land and damages are various and conflicting, but the master has reached a conclusion on the subject, which is fully in accordance with the weight of the testimony, and is just and fair. As to the fencing, the counsel of the parties agreed before the master, as appears by the record, that "the fencing should be computed at one hundred and eighty-six panels, along the line of the road," and the master so computed it.

The railroad cut off a tract of about four acres from the rest of the farm, and it was proper to include, in the damages, the cost of fencing on both sides of the railroad. In the agreement set out in the bill, the company agreed to make and maintain a fence on each side. The master has allowed for the making of the fence only, and has made no allowance for maintaining it. The defendants made the fence on the west side of the railroad, and have maintained it, but none has been made on the east side. The master has allowed the cost of the fence on the west side,

Gatzmer v. Philadelphia and Atlantic City R. R. Co.

and interest thereon to the date of the report, but has allowed only the cost of making the fence on the east side, so that he has made no provision for maintaining the fence. But there are no exceptions on the part of the defendants. The exceptions will be overruled, with costs.

WILLIAM H. GATZMER et al., trustees &c.,

v.

PHILADELPHIA AND ATLANTIC CITY RAILWAY COMPANY.

A manager was employed by the receiver of an insolvent railroad company mainly to perform duties which the receiver himself should have attended to. In a subsequent order for the disposition of the proceeds of the foreclosure of a mortgage on the railroad, an amount was awarded to the receiver as compensation for his services, and he was thereby directed to pay the manager a specified portion thereof. He refused to do so, claiming that the manager was indebted to him individually in a larger amount.—*Held*, the indebtedness from the manager to the receiver being admitted, that a petition by the manager for an order compelling the receiver to pay him the amount specified should be dismissed for want of equity.

Bill to foreclose. On petition of Samuel Richards for order on master to pay to him certain money.

Mr. H. A. Drake, for petitioner.

Mr. S. H. Grey, for respondent.

THE CHANCELLOR.

This application is made by Samuel Richards for an order for the payment to him instead of Charles R. Colwell, of the sum of \$2,839.75, part of the sum of \$5,000 which, by the execution in this suit, the master to whom the writ was directed and who sold the mortgaged premises thereunder, is required to pay to

Gatzmer v. Philadelphia and Atlantic City R. R. Co.

Colwell. By the decree (made July 10th, 1883), the master is required to pay to Colwell, as receiver in insolvency of the Philadelphia and Atlantic City Railway Company, the defendant, certain moneys in and for settlement of claims against him as receiver, remaining unpaid, and also the further sum of \$5,000 which was thereby adjudged to be a reasonable compensation for his services in the management of his trust (as receiver), from which sum was to be paid by said Colwell the balance, \$2,839.75, found due to Samuel Richards (the petitioner), the manager of the company during the receivership. Colwell, as receiver, employed Richards to act as manager, but at no specified rate of compensation. He paid him some money (\$2,405) on account. Richards, by his petition filed in the insolvency suit in April, 1882 (his services ended in July, 1879), applied to this court for payment of the balance due him, and thereupon an order of reference was made to a master to ascertain what was due him, and the master reported that he was entitled to receive a balance of \$2,839.75. After this report and in July, 1883, the decree in this suit (which was for foreclosure and sale of the railroad &c., as mortgaged premises under a mortgage existing when the proceedings in insolvency were begun) was made, and in it were the directions before mentioned. It will be observed that the decree adjudges that \$5,000 be paid to Colwell for his services as receiver, from which was to be paid the balance due Richards for his services. Colwell, as before stated, employed Richards and paid him the \$2,405 on account. The services rendered by Richards were such, to a considerable extent at least, as in contemplation of law the receiver himself was bound to render. Colwell employed Richards to do his work. Therefore, in awarding compensation to Colwell it was proper, in justice to the trust, to provide that he should pay out of the money given to him for compensation what Richards was entitled to from him. Colwell claims that he is entitled to the balance due Richards to apply it to a debt due him from Richards, and the latter now applies for an order requiring the payment of the money to him instead of to Colwell. Richards admits that he knew when the decree was made that it awarded the \$5,000 to

Applegate v. Tyson.

Colwell, merely providing that Colwell should pay him out of it, but he made no objection. He owes Colwell about \$5,700 on account of a loan of \$5,000 (and interest thereon) made by the latter to him in August, 1877. The indebtedness is not denied, but Richards asks this court to require the master to pay the money to him instead of to Colwell, so that it may not be applied to the payment of his debt. There is no equity in the application. The petition will be dismissed, with costs.

JOHN S. APPLGATE, receiver &c.,

v.

WASHINGTON L. TYSON et al.

In a litigation in this court over a bond and mortgage made to A in trust for B, the complainant was appointed the receiver thereof, with authority to collect the money due thereon and distribute it among C, D and E. In a subsequent foreclosure suit upon the mortgage by the receiver—*Held*, on demurrer, that A, B, C, D and E were not, nor was any of them, necessary parties.

Bill to foreclose. On demurrer.

Mr. R. Wayne Parker, for the demurrants.

Mr. R. Allen, Jr., and *Mr. S. M. Dickinson*, for complainant.

THE CHANCELLOR.

This is a demurrer for want of parties complainant. The suit is brought to foreclose a mortgage, and is instituted by a receiver appointed by this court to collect the money due upon the mortgage, and make distribution thereof. The receiver is the only party complainant, and the defendants are the mortgagor and his wife, and other persons owning part of the land. The demurrants insist that Maria L. Parker, James Eugene

Applegate v. Tyson.

Parker, Maria Louisa Parker, Samuel Parker, and Elizabeth B. Parker, are necessary parties. It appears by the bill that the complainant was appointed receiver in this court in a suit in which James Eugene Parker, Maria Louisa Parker, Samuel Parker, and Elizabeth B. Parker, were complainants, and Frank S. Winchester, Washington L. Tyson, and Maria L. Parker, were defendants; that in that suit it was adjudged that Maria Louisa, Samuel and Elizabeth B. Parker were entitled to recover from Winchester the sum of \$11,525, with interest, and that they were entitled to the mortgage now in suit (which had been given to him as trustee for Maria L. Parker by Winchester) and the bond, the payment of which it was given to secure, or to the moneys due thereon; and that John S. Applegate (the complainant in this cause) be and he was thereby appointed receiver in that suit to take possession of the bond and mortgage, and take such measures as might be necessary to recover the money due thereon and to make distribution of the proceeds. The bill also states that the complainant, under and by virtue of the authority and direction of the decree, has received the bond and mortgage from the clerk of this court, with whom it had been deposited by order of this court, and has possession thereof. It also states that he is thereby and by virtue of his office of receiver, entitled to recover, collect and receive the money due and to become due on the bond and mortgage, and under the direction of this court to institute and prosecute proceedings for the recovery and collection of the money. It also states that Maria Louisa, Samuel and Elizabeth B. Parker are entitled to the bond and mortgage and the money due upon them. The receiver has title to the bond and mortgage. By the authority given him to collect the money due and to grow due upon them he has such an interest in them as enables him to maintain suit thereon in his own name alone. They were, as before stated, made in favor of Frank S. Winchester, trustee of Maria L. Parker. The decree divested the former of all title thereto, and Maria L. Parker of all interest therein, and invested the complainant as receiver with title for the purposes of collection, directing him to collect the money and make distribution of it among the

Atlantic City Water Works v. Atlantic City.

three, Maria Louisa, Samuel and Elizabeth B. Parker, according to the directions of the decree.

It is quite clear that it is not necessary to join either Winchester or Maria L. Parker as complainant, and it is equally clear that it is not necessary to join the persons decreed to be entitled to the bond and mortgage. James Eugene Parker has not, and for aught that appears never had, any interest in them.

It is urged that unless Maria L. Parker be made a party, she may defeat the title of the purchaser under the foreclosure sale, by a successful appeal from the decree by which she was divested of her interest. This objection would not be obviated by making her a party; for she would not be a party voluntarily, but would be made such against her will, and only by virtue of the order or decree, if one were made, directing that she be made a party. If she should not, by appeal, stay the proceedings, the sale will be binding upon her. None of the persons named in the demurrer are necessary parties. The demurrer will, therefore, be overruled.

ATLANTIC CITY WATER WORKS COMPANY

v.

ATLANTIC CITY et al.

The complainants were incorporated, under a general statute, to supply Atlantic City, the defendant, with water. They afterwards contracted with the city for that purpose, and thereby accepted the provisions of certain ordinances regulating the mode of supplying the water, both for public and private purposes. They received in return exemption from municipal taxation, and also the exclusive privilege of furnishing water to the city and its inhabitants. They constructed their works at a large expense, and supplied the water, as required by their contract, satisfactorily.—*Held*, that whether or not the city's grant of the exclusive privilege of furnishing water was *ultra vires*, and void as creating a monopoly, the city had exhausted its power as to providing a water supply; that the complainants' franchise was exclusive, and that conse-

Atlantic City Water Works v. Atlantic City.

quently, this court would, by injunction, protect the complainants against any invasion of their rights by persons laying water-pipes &c., under municipal authority, to compete with them unlawfully.

Bill for an injunction. On motion to vacate order to show cause &c.

Mr. H. L. Slape, for the motion.

Mr. S. H. Grey and *Mr. P. L. Voorhees*, *contra*.

THE CHANCELLOR.

The bill is for an injunction. It states that the complainant was incorporated October 25th, 1880, under the act "for the construction, maintenance and operation of water works for the purpose of supplying cities, towns and villages in this state with water," approved April 21st, 1876, to supply Atlantic City with water; that the city gave the requisite preliminary consent to the incorporation, and that on the next day after the company was incorporated it entered into a contract with the city by which the company agreed to keep, observe and execute all the stipulations and conditions of an ordinance of the city, entitled "An ordinance to provide a supply of water for Atlantic City," which ordinance was approved October 21st, 1880, and a copy thereof was annexed to the certificate of incorporation of the complainant; that in consideration thereof the city covenanted with the complainant that it would not grant to any other person or persons or body politic or corporate the right to lay water-pipes beneath the surface of the public avenues, streets, lanes or alleys of the city for the purpose of supplying water to the city or the inhabitants thereof; that after making that covenant the city passed another ordinance, supplemental to the before-mentioned one, which the complainant accepted and agreed by written agreement to observe, keep and perform all the stipulations, provisions and conditions contained in the two ordinances; that the complainant, on the faith of those agreements between it and the city and the before-mentioned covenant by the city, constructed

Atlantic City Water Works v. Atlantic City.

its works at a great expense (about \$240,000), and ever since the summer of 1882 has supplied the city and the inhabitants with water according to the terms of the agreements and its obligation in the premises, and that the city is now, in violation of its covenant, about to give to certain other persons the right to lay pipes for furnishing water to the city and the inhabitants thereof. The bill seeks to restrain it from doing so. On the filing of the bill, an order to show cause why an injunction should not be issued in accordance with the prayer of the bill was made, with an *ad interim* stay. The city now moves, on the bill alone, to vacate the order and the stay, on the ground that the covenant was designed to secure to the complainant a monopoly, and therefore was *ultra vires* and is of no effect.

The city council was empowered by the charter to pass such ordinances as they should judge proper for (among other things) providing a supply of water for the city. *P. L. of 1866 p. 318*. To this end it passed the ordinances mentioned in the bill and entered into the before-mentioned contract with the complainant, and thus, so far as appears and as is alleged in the bill, not only provided for but actually secured and obtained such supply.

The before-mentioned act "for the construction, maintenance and operation of water works for the purpose of supplying cities, towns and villages of this state with water" (*Rev. p. 1365*) provides that any number of persons, not less than seven, a majority of whom shall reside in this state, may form a company for the purpose of constructing, maintaining and operating water works in any city, town or village in this state having a population of not more than fifteen thousand and not less than two thousand inhabitants, and for the purpose of supplying such city, town or village and the inhabitants thereof, with water; that such persons desirous of forming a company for such purpose shall make, sign and acknowledge a certificate stating the corporate name adopted by the company, the amount of capital stock, the term of existence of the company, the number of directors, and the names of those who shall manage the affairs of the company for the first year, or until their successors are elected and qualified, and the name of the city, town or village

Atlantic City Water Works v. Atlantic City.

in or for which such works are to be constructed and the business of the company carried on ; which certificate shall be filed in the office of the secretary of state, together with the consent of the corporate authorities, if any, of the town or city proposed to be supplied with water, and that when such certificate and consent shall have been filed, the persons who shall have signed and acknowledged the former, and their successors, shall be a body politic and corporate, and shall have power as such to take and divert any and all such springs and streams of water, and build and maintain such works, and lay such pipes and conduits as may be necessary and proper to enable the company to carry into effect the purposes of its incorporation. The act gives the company power of condemnation &c., and authorizes and empowers it to lay its pipes beneath such public roads, streets, avenues and alleys as it may deem necessary for the before-mentioned purposes, and to place hydrants at the crossings or intersections of such streets and alleys, free of all charge, for the privilege ; provided that the pipes shall be laid at least three feet below the surface of the street or road &c., and that the consent be obtained of the corporate authorities, if any there be, of the town in which the pipes may be laid. The act provides that the company may sell and dispose of the water from its reservoirs, aqueducts or pipes for such price or rents, and with such restrictions as it shall think proper.

The before-mentioned ordinance of October 21st, 1880, granted to John W. Moffly, Walter Wood, and their associates, or such company as they might form under the laws of this state, permission to lay pipes beneath the surface of the avenues, streets, lanes and alleys of the city upon condition that the pipes to be laid should at all times be sufficient to furnish the city and all the inhabitants thereof, and all the visitors thereto, with a continuous and uninterrupted supply of water of a quality and quantity sufficient to meet all public and private requirements ; and it declared of what character and quality the pipes should be ; that nothing but pure, fresh water should be conducted through the pipes ; that the water should come from artesian wells, but if the company should fail to obtain it from such sources, it

Atlantic City Water Works v. Atlantic City.

should be collected from the streams or springs on the main land, west of the salt meadows, and should be effectually guarded against contamination, and kept as pure until served as it is in the streams or sources from which it is taken; that the company should construct in the city a tank or tanks, or a stand-pipe, sufficiently large and strong to hold, and which should, at all times, contain, at least, one hundred and eighty thousand gallons, at an elevation of not less than eighty feet from the level of the street, and to be properly connected with the pipes for distributing the water; that the company should, at all times, furnish the city with a full and uninterrupted supply of water for extinguishing fires, sprinkling streets, and for use at the public buildings, including school-houses; the water for public buildings to be furnished free of charge; that the company should place fire hydrants, of a specified character, in such place in the built-up portion of the city as the city council might, from time to time, designate; that the rights and privileges granted should be subject to the act "for the construction, maintenance and operation of water works, for the purpose of supplying cities, towns and villages in this state with water;" and that in case the company should not comply with all the conditions of the ordinance, for a period of thirty days after notice given to it by the city council, the provisions of the ordinance should cease, terminate and become void without further notice. It was also provided that the company should begin work, under the ordinance, within thirty days after its passage, and complete it in one year thereafter, and that the ordinance should take effect as soon as the company should enter into articles of agreement (to be executed in five days after the passage of the ordinance) with the city, binding the company to execute all the stipulations and conditions of the ordinance. The company duly accepted the ordinance, by an agreement made on the 26th of October, 1880, five days after the day on which the ordinance was approved. The agreement was executed by both the city and the company. It recognized the complainant as the company formed under the laws of this state by Moffly and Wood and their associates, as mentioned in the ordinance. By that agreement the company

Atlantic City Water Works v. Atlantic City.

bound itself to keep and perform, observe and execute, well and truly, all the stipulations, provisions, conditions, matters and things contained, set forth and stated in the ordinance, and the city, on its part, entered into the before-mentioned covenant. The amendatory or supplementary ordinance was approved November 19th, 1880, and the other agreement was made subsequently, and in pursuance of the provisions of that ordinance. That ordinance gives the permission to lay the pipes, to the company by name, provides that the company shall construct a stand-pipe of the capacity and height mentioned in the original ordinance; that it shall furnish a supply of water as provided for in the original ordinance, and that the fire hydrants in the built-up portion of the city shall not be less in number than fifteen for every mile of pipe laid from the pumping station for distributing the water in and through the city. It limits the number of water-carts for sprinkling the streets, and provides that the pipe distribution shall be not less than ten miles in length, exclusive of the pipes, to bring in the water from the source of supply to the pumping machinery. On the other hand, it provides that the property and franchises of the company belonging to the water-works shall be exempt from municipal taxation "during the life of the franchise" therein "granted," and so long as the company, its successors or assigns, shall continue to own, maintain and operate the water works in accordance with the provisions of that ordinance, and that all the stipulations, conditions and agreements contained in that ordinance shall continue in force so long as the company complies with the provisions of that ordinance and the original one, except in the event of forfeiture as therein mentioned.

The provision for forfeiture thus alluded to is that in case the company shall neglect or fail to comply with the provisions of that ordinance for thirty days after notice given to it by the city council (reasonable time to be allowed for repairing any damages caused to the works by unforeseen accidents), then all the provisions of that ordinance shall cease, terminate and become void without further notice. The amendatory or supplementary ordinance appears to have been designed for the purpose of directly

Atlantic City Water Works v. Atlantic City.

recognizing, contracting with and binding the company by name in the ordinance for the supply of water, and adding conditions to those in the original ordinance, and for the purpose of giving to the company further advantages than those which it had under the original ordinance. The company and the city, on November 19th, 1880 (the same day on which the amendatory ordinance was approved), entered into an agreement by which they mutually covenanted with each other to keep, perform, observe and execute well and truly all the stipulations, provisions, conditions, matters and things contained in both of the ordinances, on their respective parts to be kept, performed, observed and executed, according to the true intent and meaning thereof. Both agreements were produced on the argument and read, by consent. The covenant that the city will not grant to any other person or persons, or body corporate or politic, the right to lay water-pipes beneath the surface of the public avenues, streets, lanes and alleys of the city, for the purpose of supplying water to the city and the inhabitants thereof, is, as before stated, in the first agreement, and was made on the condition that all the provisions, stipulations and conditions contained in the original ordinance and in the agreement of which the covenant was part, should be well and truly kept and performed, observed and executed by the complainant, its successors and assigns. The complainant alleges that it has kept its agreements and has done its whole duty in the premises. Of the power of the city to make the contract (apart from the covenant), there can be no question. The city had power, by its charter, to provide for a supply of water, and in this power is implied the power to furnish the supply by contract. The water company was incorporated for the purpose, and only for the purpose, of supplying the city with water, and all its franchises were acquired and its money expended for that object alone. Its expenditures, which have been very large (nearly a quarter of a million of dollars), have been made solely for the exercise of its franchises in that place. That the legislature contemplated the making of contracts by cities for a supply of water is manifest from the method which it provided for furnishing them with such supply, viz.,

Atlantic City Water Works v. Atlantic City.

the formation of companies, with their consent, to supply water to them. It is also further evidenced by the provisions of the act of 1881 "to authorize municipal corporations to contract for a supply of water for public uses" (*P. L. of 1881 p. 118*), the proviso of which limits such contracts to the period of ten years, with a further proviso that the act shall not apply to any city which, at the passing of that act, was supplied with water for public use pursuant to an existing contract or arrangement with some board or corporation. See, also, the amendatory act of 1884. *P. L. of 1884 p. 324*. It is obvious that it would be found necessary, in order to induce a company to invest its capital in the enterprise of furnishing a supply of water to a city, to secure the company by contract against competition which would not only diminish its profits but might deprive it of all adequate return for its outlay and destroy the enterprise. And where, under the power to provide for a supply of water to the city, the municipal authorities have, by contract, made such provision, it is quite clear that the company with which they have so contracted is entitled to protection against the breach of the contract on their part. The cases cited by the defendants' counsel as authority for the proposition that such a covenant as that made by the city in this case is *ultra vires*, are cases in which the grant of a monopoly in the furnishing of illuminating gas was held to be beyond the powers of a municipality. The principal case is *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, in which it was held that the city had not the power to grant to a gas company exclusive use of the streets for laying gas-pipes. It was also held in that case that the legislature itself had not such power. In *State v. Milwaukee Gas-Light Co.*, 29 Wis. 454, it was held that the legislature might confer upon a private corporation the exclusive right to manufacture and sell gas and to erect works and lay pipes therefor within the limits of a municipal corporation. In *State v. Cincinnati Gas-Light and Coke Co.*, 18 Ohio St. 262, it was held that in the absence of authority from the legislature to do so, the city of Cincinnati had not the power to grant such exclusive right; but the court declined to enter upon the consideration of the question

Atlantic City Water Works v. Atlantic City.

whether the legislature had such power. The right of the company to protection in this case does not depend upon the covenant. If the city has, by the contract with the complainant, secured a supply of pure and wholesome water, and that contract was fairly obtained by the company, and the company has observed and kept the agreement, there appears to be no good reason why it should not be protected against the destruction or diminution of the value of its property by means of competition.

The city having already executed the power of furnishing a supply of water, and being abundantly supplied, an attempt on its part, in violation of its contract, to create such competition, could not be justified on the ground that it is a further exercise of that power. It is noticeable that not only do the ordinances provide for a supply of water, but the original one is entitled "An ordinance to provide a supply of water for Atlantic City." The city must be regarded as having executed the power so long as the complainant performs its obligations. As matters now stand, the city has provided for and obtained a supply, and it has, therefore, now no power to make any further provision on that head, for there is no room for any; the city is already supplied. Assuming, as we must on the argument of this motion, that the statements of the bill are true, there is no reason or excuse for the proposed breach of faith. The only excuse offered is that the city is not bound by the covenant, because it was *ultra vires*. The ordinances were a contract on the part of the city with the company. The covenant itself is evidence of the contract. Leaving the covenant entirely out of view, and considering the subject in the light of the contract merely, if it be admitted that the company has hitherto performed, and is still prepared and proposes to continue to perform its part of the agreement, it is entitled to protection. It has made very large expenditures on the faith of the agreement that it should have the privilege of supplying the city with water, and it would manifestly be highly unjust and inequitable to hold that the city has the power and may exercise it, of diminishing, if not of destroying, at will, the value of the company's investments made on the faith of the

Sharp v. Wyckoff.

contract. The legislature necessarily contemplated the expenditure by the company of its funds for the purpose for which it was created, and it cannot be supposed that it intended that the company should have no security against competition which might deprive it of all advantage of its large outlay. The franchise granted by the legislature to the company is, by necessary implication, exclusive. The purpose for which it was granted shows that it must have been intended to be so. It was bestowed for a single object—the supplying of Atlantic City with water. The requirement that the city consent to the creation of the corporation gives strength to the inference. Equity will protect a corporation entitled to the enjoyment of an exclusive franchise, against unlawful competition. *Del. and Rar. Can. Co. v. Rar. and Del. Bay R. R. Co.*, 2 *McCart*, 13; *Ogden v. Gibbons*, 4 *Johns. Ch.* 150; *Newburgh Turnpike Co. v. Miller*, 5 *Johns. Ch.* 101. So long as the company shall continue to supply the city with pure and wholesome water at reasonable rates it will be entitled to protection against unlawful competition. It is not necessary to that protection, however, to prevent the city from granting permission to others to lay pipes. The remedy is to restrain such persons, whether natural or artificial, from availing themselves of the permission, to the prejudice and injury of the complainant. The motion will be granted.

JOHN W. SHARP

v.

MARTIN WYCKOFF et al.

1. An oral agreement to reduce the rate of interest on a mortgage from seven to six per cent., and to pay it semi-annually instead of annually, made after the mortgage became due, is valid.

2. A preliminary notice is not requisite to a tender of money on a past-due obligation.

Sharp v. Wyckoff.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. A. A. Clark, for complainant.

Mr. H. B. Herr, for Mrs. Wyckoff.

THE CHANCELLOR.

The defence in this case is that on the 4th of April, 1884, before the bill was filed, and after the mortgage was due, Mrs. Wyckoff, the owner of the mortgaged premises, by Fisher Pidcock as her agent for the purpose, tendered the complainant the amount then due on the mortgage in payment thereof, and that the latter refused to accept the money. It is proved that the tender was duly made, and that it was refused by the complainant. After the refusal, and on the same day, the money was deposited in the Clinton bank, where it remained until the next day after the bill was filed, when it was drawn and tendered to the complainant, who again refused to accept it, and it was then immediately re-deposited in the same bank, where it remained until it was withdrawn therefrom to be paid into court in this cause. It was so paid into court. During all the time that it was deposited in bank, it drew no interest. On the day before the bill was filed, at about one P. M., the complainant's attorney called on Mrs. Wyckoff, at her house, and asked her whether "she was ready to pay off the mortgage." She replied that she would be so soon as she could get the money from the bank.

NOTE.—In New Jersey, and in several other states, the same strictness and requirements in pleading a tender are as necessary in equity as at law, *Shields v. Lozear*, 7 C. E. Gr. 447, and cases therein cited; also, *Cothran v. Scanlan*, 34 Ga. 555; although a more lax rule prevails in some states, *Webster v. French*, 11 Ill. 254; *Board of Supervisors v. Henneberry*, 41 Ill. 179; *Binford v. Boardman*, 44 Iowa 53; *Breitenbach v. Turner*, 18 Wis. 140; *Whelan v. Reilley*, 61 Mo. 565; *Quin v. Brittain*, 1 Hoffm. Ch. 353.

Formerly, the rule was that a tender could not be made *after* the day of payment, *Day v. Lafferty*, 4 Ark. 450; *Huston v. Noble*, 4 J. J. Marsh. 130.

As to the effect on the lien of a mortgage of a tender, made after the day of payment, see *Shields v. Lozear*, 5 Vr. 496; *Crain v. McGoan*, 86 Ill. 431; 18 Am. Law Reg. 178, 182, note.

Notice of a tender after the day of payment is unnecessary, *Crain v. Mc-*

Sharp v. Wyckoff.

The bank was about eight or nine miles from her house. She was unable to get the money from the bank on that day, but got it the next day, and tendered it as before mentioned.

The amount tendered was the principal and the interest, at the rate of six per cent. per annum. By the terms of the bond, the interest was payable at the rate of seven per cent. It appears that about a year before the tender was made, the complainant agreed with Mrs. Wyckoff, orally, that the interest, which, according to the terms of the bond and mortgage, was payable yearly, at the rate of seven per cent. per annum, should thenceforward be payable at six per cent. only, but in half-yearly payments. Two half-yearly payments (up to the 1st of April, 1884) were made afterwards at the rate of six per cent. The money tendered was, as before stated, the amount of the principal, with the interest at that rate. The complainant's counsel insists that the amount tendered was insufficient, and that interest should have been computed at seven, instead of six per cent. He insists, also, that the evidence of the agreement (which was merely oral) to reduce the rate of interest, is not competent, because, as he argues, if allowed, it would vary the terms of the bond. The objection is not well taken. When the oral agreement was made, the bond was past due. By its terms the interest was payable yearly. In consideration of the payment of the interest half-yearly, the complainant agreed to reduce the rate to six per cent. This was a new agreement in substitution of the agreement in the bond. Parol testimony is admissible

Goon, 86 Ill. 431, 434; except in the case of a tender of a chattel, *England v. Witherspoon*, 1 Hayw. 361.

But a tender made at an unreasonable hour, without notice, is invalid, *Waldron v. Murphy*, 40 Mich. 668; or the debtor must be allowed a reasonable time thereafter to comply, *Cogan v. Cook*, 22 Minn. 137.

Merely having in a bank the money to meet an obligation, payable at that bank, is not sufficient, *Myers v. Byington*, 34 Iowa 205; *Caldwell v. Cassidy*, 8 Cow. 271; although the debtor must keep the money in the bank afterwards, *Com. v. Chevor*, 3 Binn. 121; *Miller v. Bank of Orleans*, 5 Whart. 503.

For cases illustrating the effect of the English rule that notice of tender after the day of payment is requisite, see *Day v. Day*, 31 Beav. 270; *Bartlett v. Franklin*, 17 L. T. (N. S.) 100; *Letts v. Hutchins*, L. R. (13 Eq.) 176.—RED.

Sharp v. Wyckoff.

under such circumstances, to prove the new agreement. *2 Pars. on Cont.* 66; *Monroe v. Perkins*, 9 *Pick.* 298. It has been repeatedly held in this state that parol evidence is admissible to show that the time for payment of a bond was extended. *Tompkins v. Tompkins*, 6 *C. E. Gr.* 338; *Stryker v. Vanderveer*, 1 *Dutch.* 482.

When the tender was made the complainant made no objection to the amount tendered on the ground that the interest was not calculated at the rate of seven per cent. He does not deny that he made the agreement. Nor did he, at the time of the tender, make any objection on the ground of the insufficiency of the amount tendered.

The complainant also insists that the tender was ineffectual because it was made *post diem*, and no notice of intention to make it was given. The case of *Shotwell's Exrs. v. Denman*, *Coxe* 174, is cited as authority for this proposition. It was, indeed, said in that case that if tender be made after the day of payment it is not good unless the debtor has given reasonable notice of the time and place of making it. But that was a mere *dictum*. Such is not the law at this day. The necessity for notice, under the English law, in case of tender *post diem* of the money due upon a mortgage, rests entirely upon custom. Vice-Chancellor Shadwell, in *Browne v. Lockhart*, 10 *Sim.* 420, 424. The rule does not exist in this state.

There will be a decree for the complainant, but only for the amount paid into court, with the interest thereon allowed on the deposit, and he will be required to pay costs to Mrs. Wyckoff.

Colthar v. North Plainfield.

ISAAC S. COLTHAR

v.

THE INHABITANTS OF THE TOWNSHIP OF NORTH PLAINFIELD.

On demurrer to a bill against the inhabitants of a township, alleging that in 1875 the complainant gave the township his bond for \$1,000, secured by a mortgage on lands, to insure the payment of \$3.50 per week so long as complainant's wife should be a charge on the township; that the township had received \$750 thereon, and that the mortgage had been canceled of record; that the wife was not a public charge after 1875—*Held*, that complainant is entitled to a discovery and account of the moneys received on the bond.

Bill for relief. On general demurrer.*Mr. J. H. Jackson*, for demurrants.*Messrs. Wilson & Suydam*, for complainant.

THE CHANCELLOR.

The bill states that the complainant gave to the defendants, the inhabitants of the township of North Plainfield, in the county of Somerset, in 1875, his bond in the penal sum of \$1,000, with condition that he should pay to the township or to the overseer of the poor thereof for the time being, the sum of \$3.50 a week every week thereafter, during and for so long a time as his wife, who was then chargeable to the township, should be chargeable to it; that to secure the payment of the money according to the condition of the bond, he gave to the defendants a mortgage upon land of his in Somerset county; that that land was afterwards sold under an execution against him on a judgment recovered in 1876, and a deed given by the sheriff therefor in November, 1878; that after that time, but at what particular time the complainant cannot state, the defendants, as the complainant is informed and believes, received from some-

Colthar v. North Plainfield.

body unknown to him \$750 or more upon the mortgage ; that after the complainant gave the bond and mortgage the overseer of the poor of the township went to his house and carried away all his household goods (of the value of about \$300) under pretence of applying them to the support of the complainant's wife ; that the mortgage was canceled of record April 11th, 1879 ; that the bond is still in the hands of the officers of the township, who refuse to deliver it up to him, although he has requested them to do so ; that he has been informed that the money received for or upon the mortgage was deposited with the treasurer of the township on the 18th of April, 1879 ; that at the time of giving the bond and mortgage the complainant gave the overseer of the poor of the township notice that he would make an arrangement for the support of his wife and provide a place of residence for her ; that shortly after that time he gave notice to the overseer of the poor and to the township committee and to his wife that he was ready and willing to support her ; that he had provided a place for her in a family in Plainfield, but his wife refused to go there and remained of choice at the almshouse of the defendants ; that he gave the township committee and the overseer of the poor notice not to pay any money to her ; that shortly after the giving of the bond and mortgage he requested his wife to live with him, but she refused, and he gave notice to the township committee and overseer of the poor of such refusal ; that after the giving of the bond and mortgage his wife went out of the township of North Plainfield into the county of Essex and resided there for a long time, and that in December, 1881, he filed a bill in this court for a divorce from her on the ground of desertion, and obtained a decree of divorce in the suit July 31st, 1883. The bill also states that he has applied to the officers of the township for an account of the money received by them from the mortgage, but they have refused to give it. The bill prays an account of the moneys received upon the bond and mortgage and of the value of the household furniture, and for a decree for the payment thereof to the complainant.

The defendants demur on the ground of vagueness in the

Neale v. Albertson.

charges of the bill, want of particularity as to time &c., and on the ground that the complainant has a remedy at law.

The substance of the bill is that the complainant gave the township his bond for \$1000, conditioned to indemnify it to the extent of \$3.50 a week against the support of his wife while she should remain chargeable to the township. The township received \$750 or more from the mortgage given to secure the payment of the bond. He insists that his wife was not chargeable after the giving of the bond and mortgage, and that she ceased to be his wife in July, 1883. He claims that he is entitled to the money received from the mortgage, or at least to an account of it, and files his bill to obtain the account and payment of whatever may be due him. The statements on which he seeks to charge the township are definite enough. He says that it received the money after November, 1878; that the mortgage was canceled of record April 11th, 1879, and that the money was deposited in the treasury of the township April 18th, 1879. The relief sought cannot be obtained at law. The complainant is entitled to the delivery of his bond to him if the defendants have no lawful claim upon him thereunder. They have received money of his on account of it, but how much he cannot say, and he seeks a discovery. He could not compel them to deliver up the bond to him in a suit brought against them at law to recover the money which he claims to be due to him from them.

The demurrer will be overruled, with costs.

WEALTHA A. NEALE

v.

BENJAMIN ALBERTSON et ux.

A mortgage on leasehold lands contained a provision that the mortgagor would insure the buildings thereon, and assign the policies to the mortgagee, or that the latter might, in the event of the mortgagor's failure to do so, effect

Neale v. Albertson.

the insurance, and the premium thereon be a lien under the mortgage. There was another provision that if the interest on the mortgage should not be paid for thirty days after it became due, the principal should, at the mortgagee's option, become payable. Nearly five months elapsed after the mortgage had been given before the mortgagor, although frequently requested to do so, procured the policies (they were never delivered to the mortgagee), and after waiting so long the mortgagee insured the premises. The mortgagor and his wife testified that, by a verbal agreement made before the mortgage was executed, the first installment of interest was to be paid out of certain rents then due. This installment was never paid.—*Held*, that the cost of the insurance was a charge on the premises, and collectible under the mortgage, and that the evidence as to the verbal agreement about the interest was inadmissible.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. J. C. Kennedy and *Mr. F. P. McDermott*, for complainant.

Mr. R. F. Stout, for defendants.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage for \$5,500 and interest, given by the defendants to the complainant, on or about November 6th, 1882, and dated on that day, upon a house and two leased lots in Ocean Grove. The principal, was by the terms of the mortgage, payable on the 6th of November, 1887, and the interest was payable semi-annually. The mortgage contained a provision that if the interest should be unpaid and in arrear for thirty days after it should have become due, the principal, with all arrears, of interest should, at the option of the mortgagee or her legal representatives, be at once due, although the time fixed for payment thereof in the mortgage might not yet have arrived. It also contained a covenant on the part of the mortgagor that he would keep the buildings on the lot insured against loss or damage by fire to an amount approved by the mortgagee, and assign the policy or policies to her; and that in default thereof, she might effect the insurance, and that the premium or premiums should be a lien on the mortgaged premises, added to the amount of the bond and secured by the mortgage, and be payable on demand, with interest at the rate of six

Neale v. Albertson.

per cent. per annum from the time of payment of such premium or premiums.

The interest, which, according to the terms of the mortgage, became due on the 6th of May, 1883 (the first payment), was not paid when due, nor within thirty days thereafter, and Albertson did not keep his covenant to insure. According to his own statement, it was not until the 1st day of April, 1883, almost five months after the giving of the mortgage, that policies were issued on his application, in compliance with his covenant. They were issued to him, and made payable, in case of loss, to the complainant, but they were never delivered to her. On the 2d of April, she having failed in her efforts to induce him to keep his covenant, obtained policies herself in his name, with provision that the loss, if any, should be payable to her. That this action on her part was necessary, appears abundantly. On the 30th of March, 1883, he wrote to her that he would not consent to any one placing any insurance upon the property without his consent, and that any so put upon the premises would be worthless, and the premium paid thereon thrown away. He added that the old policies had been expiring, and that he had instructed the agents to endorse one-half of them to her on their renewal, and that when renewed he would send them to her. He added that he took pride in saying his early training had been such as in case of loss to compel him at once to satisfy her claim against the property. At that time she had no security by way of insurance. After receipt of that letter, she obtained insurance as before mentioned. It was necessary for her protection against loss. Immediately after she obtained the policies she wrote to Albertson, stating that she had done so, and demanding payment of the money, \$82.50, which she had paid for premiums. It appears that in October, 1883, the company which had issued one of the policies ordered it canceled, and thereupon she took out a new one in another company for the same amount, to run for a year from that time, and paid \$15.95 additional premium. The amount for which the property was insured by her was \$5,500.

The building covered the greater part, at least, of the lots, and

Neale v. Albertson.

the lots were held, not in fee, but upon lease. Under the circumstances, it is clear that she is entitled to recover the premiums paid by her. Although the bill states that Albertson did not keep his covenant to insure, and that the complainant, in consequence of his failure to comply with his agreement, was compelled to insure, and it asks for payment of the premiums paid accordingly, the answer is silent on that point, and the defendant must therefore be held to have admitted the truth of this statement in the bill. Apart from this, however, on the proof, the complainant is entitled to recover the premiums paid by her, and to enforce payment under her mortgage.

The bill alleges and the answer admits that there was a default for more than the thirty days in the payment of interest. The answer sets up as ground for relief from the forfeiture that it was agreed by and between the complainant and Albertson, when the mortgage was given, that the interest for the first six months after the date of the mortgage should not be payable until it should have been collected by him out of a certain demand for rent of the mortgaged premises, subsisting and past due when the mortgage was given. The mortgage was given to secure to the complainant the price of her interest (one-half) in the property on the sale thereof to Albertson, and in consideration of that price he was to have her interest in that rent also. The complainant absolutely denies the existence of the alleged agreement. The evidence of it adduced by the defendants is their own testimony on the subject. By that testimony it appears that the alleged agreement was made before the signing of the mortgage. Both, indeed, say that it was so agreed, both before and afterwards, but they speak of the same occasion, the time when the mortgage was given, and not of any other day. It is not claimed that the agreement was made in substitution of the provisions in the mortgage, but that it was understood and agreed that notwithstanding the terms of the mortgage, the first six months' interest should not be payable until Albertson should have collected it from the rent. Albertson says that he would not sign the bond and mortgage until that agreement was made,

Yard v. Larison.

and his wife's testimony is substantially to the same effect. The evidence contradicts the mortgage, and is not admissible.

Nor is there any ground for relieving the defendants from the forfeiture. The complainant came to her residence in Asbury Park about the 1st day of May, and remained there during the summer. She was very constantly at home. About the 21st of May she sent a postal card to Albertson stating that she was in her cottage to stay for a week or two, and would be glad to hear from him concerning the interest. He says that shortly after he received the card he called at her cottage to see her, but found no one at home, and that he went again three or four days afterwards with like result. The complainant says that she is confident that she was away from home only one night before the thirty days expired. Albertson, had he been disposed to do so, could have found her to pay her the interest within the thirty days. There will be a decree for the complainant for the principal and interest thereon, and the money paid for insurance and interest thereon.

WILLIAM S. YARD, trustee &c.,

v.

GEORGE LARISON.

A testator devised two houses and lots to two trustees, to receive the rents thereof, and to apply them to the maintenance of his daughter's children, with a direction to sell after his youngest grandchild should have attained its majority. Before that time both trustees died, and the complainant was appointed by the orphans court to execute the trust, the order of his appointment providing that he should not sell the premises without giving additional security. After the youngest grandchild was twenty-one years old, he gave the additional security, which was approved by the orphans court, and sold the property at public sale, the defendant buying one of the houses. On a bill by the trustee for specific performance—*Held*, that, under the statute, the order of the orphans court conferred upon the complainant the power of sale vested by the will in the original trustees, and that the defendant must carry out his purchase.

Yard v. Larison.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. B. Gummere, for complainant.

Mr. J. S. Aitkin for defendant.

THE CHANCELLOR.

Jesse Redman, deceased, late of Mercer county, died December 5th, 1866. By his will, he devised to Wollaston Redman and Samuel Wooley, and to the survivor of them, two houses and lots in Trenton, in trust to, and for the following uses and purposes, viz., to receive the rents, issues and profits thereof, and apply them, in the first place, to the payment of taxes, and to keeping the property in repair and insured, and to the payment of all necessary expenses of collection; and secondly, to apply them in their discretion, or in the discretion of the survivor of them, or of such trustee or trustees as, in case of their decease, might be appointed to execute the trust, for the education, support and maintenance of the children of his daughter, Catharine R. Mills, deceased, according to their necessities and circumstances &c., and on the further trust, to sell the property when the youngest of those children should have attained to majority, and divide the proceeds equally among all of those children then living, and the children of any of them who might then be dead, as representatives of their deceased parent; with power to said trustees, or the survivor of them, to make, execute and deliver good and sufficient conveyance for the property, and every part thereof, without any liability on the part of the purchaser or purchasers, for the appropriation of the purchase-money &c. Both of the trustees died after the probate of the will, and before the youngest of Catharine's children attained to majority, and consequently before sale of the property. After their death, the orphans court of Mercer county, by order of November 19th, 1869, appointed William S. Yard trustee in their stead. The order of appointment, after reciting the trust as contained in the will, the death of the trustees therein named,

Yard v. Larison.

and the application for the appointment of a new trustee in their stead, proceeds as follows :

" And it appearing to the court that William S. Yard is a suitable person to execute the said trust—that is to say, that he shall receive the rents, issues and profits of said real estate, and apply the same, in the first place, to the payment of taxes, and to keeping the said property in repair and insured, and of all necessary expenses of collecting ; and secondly, to apply the same, in his discretion, for the education, support and maintenance of the children of Catharine R. Mills, deceased, according to their necessities and circumstances, as directed by said will : It is, on this 19th day of November, 1869, ordered and directed that the said William S. Yard be, and he is hereby appointed trustee, to execute such trust in the room and stead of the said Samuel Wooley and Wollaston Redman, deceased, so far as directed by the foregoing order, upon his entering into bond to the ordinary of the state of New Jersey, in the sum of \$5,000, with George F. Brown and Joseph B. Yard as sureties for the due performance of said trust, but the said William S. Yard shall have no power to dispose of said real estate as directed in said last will and testament, until he shall have given further security as may be approved of by this court."

The complainant gave the bond, and entered upon the execution of the trust. In January, 1884, he represented, by petition to the orphans court, that it had become necessary for him, as trustee, to dispose of the real estate, as directed by the will, and he offered Joseph B. Yard and Joseph McPherson as his sureties in a bond to be given according to law. Whereupon, the court, on the 15th of that month, ordered that he proceed to execute the trust (to sell), and approved his bond. He sold the properties at public auction, and for one of them the defendant was the highest bidder. The latter signed the acknowledgment of his purchase. By the conditions of sale, the deed was to be delivered on the 1st day of April, 1884. The complainant prepared and signed the deed in the latter part of March. The defendant borrowed it with a view to borrowing money by mortgage upon the property, to enable him to complete his purchase. Before the 1st of April he returned it, stating that it " was not a good deed." He did not apply for the deed on the 1st of April. The complainant, immediately after he was informed of the objection to the deed (which appears to have been upon the ground that he had no title to the property, and that the order of appointment was invalid), set about obviating the objection of want

Yard v. Larison.

of title, and got the heir-at-law of Wollaston Redman, who survived his co-trustee, to join him (with her husband) in a deed to the defendant. He tendered the new deed to the defendant on the 3d or 4th of April, but the defendant refused to accept it.

The principal question is, whether, under the order of the orphans court, the complainant obtained title to the trust property, so that his deed therefor would convey a good marketable title. By the orphans court act (*Rev. p. 777 § 114*), it is provided that when any trustee appointed by last will shall neglect or refuse to act, or shall die before the execution and completion of the trust committed to him, the orphans court of the county in which the testator resided at the time of his death, shall have power to appoint some suitable person or persons to execute such trust &c., and that the trustee or trustees so appointed shall have all the power of the trustee or trustees so neglecting, refusing or dying. By the act, the court is authorized and required to take from such trustee or trustees, a bond with one or more sufficient sureties, being freeholders, conditioned for the due performance of the trust. The trustee or trustees appointed by the court are clothed, by the act, with all the power of the trustee or trustees, in whose stead he or they are appointed. The complainant, therefore, under his appointment, had power to sell and convey. It is familiar law that the execution, by the donee, of a mere naked power to sell and convey, passes the title, notwithstanding the fact that he is possessed of such mere naked power only, and the title is in some one else. *Gest v. Flock, 1 Gr. Ch. 108*. Therefore, if the order of the orphans court was a valid appointment of the complainant as trustee in the stead of the trustees under the will, he had power to sell and convey the legal title, although it was vested in the heir-at-law of Wollaston Redman.

But it is urged that the appointment itself was invalid. This objection is based upon the allegation that the first order conferred on the complainant no power to sell, but only a power to receive the rents, issues and profits of the property and apply them. But the first order obviously appointed the complainant trustee in the place of the trustee under the will, and merely restrained him from exercising the power of sale until he should

Yard v. Larison.

have given such further security as might be satisfactory to the court in that respect. By the second order his security was approved, and the restraint removed. The first order appoints him trustee to execute "such trust" in the room, and stead of the trustees appointed by the will, so far as directed by "the foregoing order" (obviously meaning the next preceding recital), upon his giving bond in the sum of \$5,000, with George F. Brown and Joseph B. Yard as sureties, for the due performance of "said trust;" but provides that he shall have no power to dispose of the real estate until he shall have given further security. The order appoints him trustee to execute the trust under the will, but provides that he is to act only to a certain extent until he shall have given further security. It contemplates no further order of appointment, but only the giving and approval of further security.

But further, if it were conceded that the first order was an appointment to execute only part of the duty of the trustees, the two orders, taken together, constituted a complete appointment. The court had jurisdiction of the subject, had power to appoint a new trustee, and if it exercised its jurisdiction and appointed the trustee, he must be held to be possessed of the powers which the statute confers. Those powers are not derived by grant from the court, but from the statute, and are incident to his appointment. The statute declares that the trustee appointed shall have all the power of the testamentary trustee whom he succeeds. The objection made on the ground of the alleged invalidity of the appointment of the complainant is without substance.

The defendant made no objection to the form or execution of either of the deeds which the complainant prepared. His objection, according to his own testimony, was to the title. Before the 1st day of April he refused to take the title, and he did not appear on that day to take his deed at the time and place when and where, according to the conditions, the deed was to be delivered, although the complainant was there. The latter is in no default. There will be a decree requiring the defendant to perform his contract.

Ernst v. Morgan.

WILSON ERNST et al.

v.

ELI B. MORGAN et al.

A statute provided that, in any county in which the fees &c. allowed county clerks for services should be collected and paid over for the use of the county, it should be lawful to have an assistant clerk, who should be paid by the county collector; that each of the clerks of said counties, whenever the population thereof exceeded sixty thousand, should appoint an assistant clerk, who should possess and exercise all the powers of the county clerk during the latter's absence, and that he should be paid an annual salary of \$2,000.—*Held*, that the act was unconstitutional, as being special legislation regulating the internal affairs of a county.

Rule for an injunction.*Mr. T. B. Harned*, for complainants.*Messrs. Garrison & French*, for defendants.

THE CHANCELLOR.

This suit is brought to restrain the defendant Eli B. Morgan, the "assistant clerk" of Camden county, appointed under the act entitled "An act creating the office of assistant clerk, and providing a suitable salary therefor, in counties in which the criminal and civil fees of the clerks go to the county collector for the use of the county," approved March 10th, 1885, from receiving, and Morris Hallock, the collector of that county, from paying to him salary as such "assistant clerk." The complainants are citizens, freeholders and tax-payers of the county. The question to be decided is whether the act under which the appointment was made is constitutional. It provides that—

"In any county of this state in which it is now or shall hereafter be provided by law that the fees, costs and compensations allowed clerks for services in the criminal and civil courts, shall be collected and paid over to the col-

Ernst v. Morgan.

lector for the use of the county, it shall be lawful to have an assistant clerk, to be paid by said collector of said county; that each of the clerks of said counties of this state, whenever the population of his said county shall exceed sixty thousand, shall appoint, under his hand and the seal of his office, an assistant clerk, to be known and designated as such, and that said assistant clerk shall be a public officer with a term similar to that of said clerk; that such assistant clerks shall have and possess all the powers of the county clerk, to be exercised in his absence and under his direction, and that it shall be competent for them to do and perform each and every act that the county clerk is required by law to perform and which he is authorized by law or custom to do or perform."

It also provides that such "assistant clerk" shall be paid the sum of \$2,000 per annum, in equal quarterly payments, by the county collector. It is manifest that this act was designed to effect precisely the same object which the act entitled "A supplement to an act concerning clerks of counties of this state" (*P. L. of 1882 p. 195*) was intended to accomplish. That act was declared by this court to be unconstitutional. *Gibbs v. Morgan*, 12 *Stew. Eq.* 126. It provided that in all counties where the county clerks were, at the passage of the act, paid by annual salary, the deputy clerk should receive the sum of \$2,000 per annum, to be paid to him in quarterly payments by the collector of those counties respectively. The office of "deputy clerk" was created by an act of 1876 (*Rev. p. 1278*), which provided that the clerk of each of the counties of this state might appoint an assistant in his office, to be known and denominated as his "deputy clerk," and gave to such deputy power, during the absence or inability of the clerk, to exercise all his powers and perform all his duties, but provided that no additional compensation should be paid to the deputy by the county. The act of 1882 was held to be in contravention of the constitutional prohibition against local or special laws creating, increasing or decreasing the percentage or allowance of public officers during the term for which they were elected or appointed, and against like laws regulating the internal affairs of towns and counties.

The act of 1876 provided for the appointment of an "assistant" to the county clerk, to be denominated "deputy clerk."

Ernst v. Morgan.

The act of 1885 provides for the appointment of such assistant, but denominates him "assistant clerk" instead of "deputy clerk." It is the same officer, but called by a different name. The act of 1876 provided that the deputy clerks should have no compensation from the county. The act of 1882 provided that they should have compensation from the county where the clerk was paid by a salary. As before stated, that act was held unconstitutional. The act of 1885 provides that there shall be an assistant clerk (giving the deputy clerk a new name under color of creating a new office), to be paid out of the county treasury, in counties where the fees &c. go to the county and the population is over sixty thousand. It is admitted that the last-mentioned act applies (as did that of 1882) to Camden county alone. That county is the only one in which the fees are, by law, paid over to the county, and it has a population of over sixty thousand. The act cannot be sustained unless that which is relied upon as a distinguishing characteristic to justify the legislation which, on its face, is partial and not general, is of such a nature as to mark the counties possessing it as peculiarly requiring exclusive legislation. *Richards v. Hammer*, 13 Vr. 435. But how does the fact that in a particular county the fees allowed to the clerk for services in the county courts indicate a necessity for the appointment in that county of an assistant clerk, to be paid out of the county treasury? Where those fees are paid into the county treasury, the clerk is paid for those services by a salary, in consideration whereof the fees go to the county. He is bound by law to perform the duties of his office, and if he needs assistance is bound to furnish it. The fact that the fees are paid into the county treasury, obviously is not evidence even of the amount of business done, and it is of itself no reason for requiring the county to pay the salary of an additional officer to assist the clerk in or relieve him from the discharge of official duties which he himself is bound by law to perform. The act itself does not present the characteristic of payment of fees into the county treasury, as being of itself sufficient ground to justify the exclusive legislation, but requires in addition that there be a population of over sixty thousand. The basis of the distinction is not popu-

Smith v. Gummere.

lation; for, though the population be beyond sixty thousand, the additional officer is not to be appointed unless in that county it is by law provided that the fees &c. be paid into the county treasury. The act is not one providing that where the population is over sixty thousand there shall be an assistant clerk to be paid by the county, but it provides that there shall be such officer, so paid, where the population is over sixty thousand, if in that county the fees &c. go by law to the county, but not otherwise. It is obvious that the controlling characteristic relied upon to justify the legislation is the circumstance that the fees go to the county. The act is clearly within the constitutional prohibition against special legislation regulating the internal affairs of towns and counties. *Freeholders v. Stevenson, 17 Vr. 173*. There will be an injunction according to the prayer of the bill.

MARY K. SMITH

v.

BARKER GUMMERE, administrator &c., et al.

The general guardian of an infant was also appointed its special guardian to sell certain lands, and gave different bondsmen in each capacity. From his imperfect mode of keeping his accounts, it is impossible to tell now which of the two funds should be credited with a certain investment. In a litigation, after his death and insolvency, between the ward and the sureties upon his respective bonds—*Held*, that each fund should be credited with one-half of the amount of the investment.

Mr. A. G. Richey, for Jonathan Steward, one of the sureties in both bonds.

Mr. J. S. Aitkin, for Samuel K. Wilson, one of the sureties in general guardianship bond.

Mr. James Buchanan, for W. J. Owens, one of the sureties in the special guardianship bond.

Smith v. Gummere.

Mr. G. S. Cannon, for General Mott's executrix.

THE CHANCELLOR.

On the coming in of the master's report, made under the order referring the accounts back to him, the question is presented as to which account, that of the general guardianship or that of the special guardianship, should be credited with the mortgage of \$5,000 mentioned in the former opinion in this cause. *Smith v. Gummere*, 12 Stew. Eq. 27. The investment in that mortgage was made by the guardian March 31st, 1875. The assignment of the mortgage was made to him as "guardian of Mary K. Smith." The account of the general guardianship shows that at the date of the assignment there should have been a balance in the hands of the guardian (not including interest on balances in his hands) of about \$3,000. The investment, therefore, could not have been wholly made with the money of the ward held by the guardian on that account. On the other hand, the \$7,000 invested by the guardian in 1865 in United States treasury notes of the second and third series of the seven-thirty loan, on account of the special guardianship, were returned to his hands by the "calling" of the securities in 1867 or 1868, six or seven years before the making of the investment in the mortgage, but there is no trace of that money after the report of investment of it in the government bonds in 1865. There is nothing to show whether he had that money, or any part of it, when the latter investment was made. Nor, on the other hand, is there any evidence that he had any money in hand on account of the general guardianship. It is impossible to say out of which fund the money was taken, or that it, or any part of it, was in fact taken from either. For the reason before given, it could not all of it have been taken from the general guardianship fund. The fact that the assignment was taken by the guardian as guardian *simpliciter*, and not as special guardian, is not of itself sufficient, under the circumstances, to give the general guardianship the benefit of the investment, nor does it materially aid in determining the question under consideration. It seems quite probable that in taking the assignment he did

Chew v. Cook.

not intend to hold the mortgage for the benefit of the ward's estate at all ; for the mortgage was upon his own property, which he bought subject to it, and he wrote on the envelope containing the mortgage the word "canceled." Under the circumstances, equality will be equity. It will be just to regard the investment as having been made with the funds of both accounts, in equal shares, and to credit one-half of it to each.

MARY C. CHEW

v.

HENRY COOK et ux.

An alley lying between two houses had been used for over forty years by the adjoining owners, for access to the rear of their houses, and to the lots behind, and belonging thereto. Both houses were destroyed by fire.—*Held*, that the easement in the alley was not thereby lost, and that whether complainant had forfeited her right thereto by placing the foundation of her house in the alley, in rebuilding (the evidence thereof being conflicting), should be determined by an issue at law before she could enjoin the defendant from appropriating the part of the alley next to his lot in rebuilding.

NOTE.—In *Bangs v. Parker*, 71 Me. 458, a deed contained this clause: "Reserving a pass-way from the road aforesaid, over or by said lot to the barn standing on the adjoining lot, being said Mary's [the grantor's] dwelling-house lot."—*Held*, that the easement was not lost by the destruction of the barn which stood thereon at the time of the reservation. See *Crain v. Fox*, 16 Barb. 184; *Henning v. Burnet*, 8 Exch. 187; *Pierce v. Dyer*, 109 Mass. 377; *Crossley v. Lightowler*, L. R. (2 Ch. App.) 478.

The destruction of a party wall destroys the easement therein, *Brondage v. Warner*, 2 Hill 145; *Sherred v. Cisco*, 4 Sandf. 480; *Hoffman v. Kuhn*, 57 Miss. 746; *Hieatt v. Morris*, 10 Ohio St. 523; *Purtridge v. Gilbert*, 15 N. Y. 601; but see *Pope v. O'Hara*, 48 N. Y. 446; *Stevenson v. Wallace*, 27 Gratt. 77.

Building over an alley which separates two houses, is not ordinarily an abandonment or loss of the easement therein, *Stevenson v. Stewart*, 7 Phila. 293; *Atkins v. Boardman*, 20 Pick. 291, 2 Metc. 457; *Beecher v. People*, 38 Mich. 289; *Gerrish v. Shattuck*, 132 Mass. 235; see *Kean v. Asch*, 12 C. E. Gr. 57; *Kana v. Bolton*, 9 Stew. Eq. 21; *Ballard v. Butler*, 30 Me. 94; *Dowling v. Hen-*

Chew v. Cook.

Bill for relief. On final hearing on pleading and proofs.

Mr. F. C. Woolman, for complainant.

Mr. F. Voorhees, for defendants.

THE CHANCELLOR.

The bill is filed for an injunction to prevent the defendants from obstructing an alley by the erection of a building upon that part of it which is upon Mrs. Cook's lot. The premises are on York street, in the city of Burlington. The bill states that in 1844 the complainant's lot was owned by Henry M. Stowell, and the Mrs. Cook's (which adjoins it on the south) by Wade Jones, and that there was between the houses erected on the two lots an alley or passage-way of about four feet in width and about equally on each lot, the dividing line of the two properties being about the middle of the alley; and that for over forty years the respective owners of the lots used the alley in common, there being gates on each lot at the rear of the alley for passage into and from it. The bill further states that on the 10th of December, 1876, the houses on both lots were destroyed by fire, and that within six months from the time of such destruction, the complainant erected a new house on her lot upon

nings, 20 Md. 179; *Grove v. Fort Wayne*, 45 Ind. 424; *Richardson v. Pond*, 15 Gray 387.

Building in the alley, or on a part thereof, is an abandonment, *Corning v. Gould*, 16 Wend. 531; *Krehl v. Burrell*, L. R. (7 Ch. Div.) 551; *Allan v. Gomme*, 11 Ad. & El. 759; *Vogler v. Geiss*, 51 Md. 407; *Steere v. Tiffany*, 13 R. I. 568; *Hall v. McCaughey*, 51 Pa. St. 43; *Dillman v. Hoffman*, 38 Wis. 559; see *Smith v. Wiggin*, 52 N. H. 112; *Arnold v. Cornman*, 50 Pa. St. 361; *Lattimer v. Livermore*, 72 N. Y. 174; *Ebner v. Stichter*, 19 Pa. St. 19; *Henry v. Koch* (Ky.), 22 Am. Law Reg. (N. S.) 394, 399, note; *Craven v. Rose*, 3 Rich. (N. S.) 72; *Taylor v. Hampton*, 4 McCord 96; *Hacke's Appeal* (Pa.), 18 Cent. L. J. 257; *Carlin v. Paul*, 11 Mo. 32; *Kirkpatrick v. Brown*, 59 Ga. 450, 453; *Dodge v. Stacy*, 39 Vt. 558; *Hayford v. Spokesfield*, 100 Mass. 491; *Bowen v. Team*, 6 Rich. 298.

That a unity of seizin does not always destroy an easement, see *Ferguson v. Witsell*, 5 Rich. 280; *Kieffer v. Imhoff*, 26 Pa. St. 433; *McCarty v. Kitchenman*, 47 Pa. St. 239; *Brown v. Berry*, 6 Coldw. 98.—REP.

Chew v. Cook.

the foundation walls of the old one, still leaving the alley unobstructed for use in common with the owners and occupants of the other lot. The answer admits the existence of the alley from 1842 to the time of the fire, and that it was about four feet wide, and about equally upon each lot. It states that the division line between the lots was about in the middle of the alley. It then proceeds to describe the alley more particularly, and alleges that the southeastwardly corner (on the street) of the house which was on the complainant's lot up to the time of the fire, was about two feet and six inches distance northwardly from the division line; that the southwardly line of the main part of the house extended thence westwardly about sixteen feet, and the rear of that part of the house was about one foot and nine inches from the division line; that the exterior line of the house then extended northwardly for about six feet, and then westwardly about twelve feet to the rear line of the house; that is, that there was an extension of about twelve feet deep in the rear of the main part of the house, the southerly side of which extension was six feet from the division line of the properties. The answer further states that the northeastwardly corner of the house on the Mrs. Cook lot was about two feet from the division line, and that the northwardly line of the house extended back westwardly nearly parallel with the division line, about sixteen feet, to the northwesterly corner of the main part of that house; that then the outward line of the house extended southwardly about two feet, and thence westwardly about twelve feet to the rear end of the house, leaving a vacant space between the two houses of about four feet and six inches in width at the York street end, and about three feet and nine inches wide at a point sixteen feet in the rear; that the alley extended further between the two houses, in all about twenty-two feet; that it was used in common by the occupants of the two houses; that there were gates at the rear, as stated in the bill, and that the alley and gates and such use thereof continued up to the time of the fire. The answer alleges that the use of the alley was by common consent of the owners and occupants of the houses, for their mutual convenience, without any grant from one party to the other, and without any

Chew v. Cook.

adverse claim, and that the alley is not mentioned in any of the deeds for either property. It denies that the complainant's new house was erected wholly upon the foundation wall of the old one, and avers that the southwardly foundation wall of the old building, from York street westwardly, along the northwardly side of the passage-way, was, for the distance of about sixteen feet, left standing, but that towards the westwardly end it was widened and built out over and upon the passage-way, and that from the westwardly end of the wall a new foundation wall was erected, running westwardly across and over a part of the alley for a distance of about thirteen feet, to a point about twenty-nine feet westwardly from the street, which point is about one inch northwardly from the division line between the lots; so that the southwardly line of the house extends, from a point in the west line of York street, about two feet and six inches northwardly, from the division line of the properties westwardly, in a straight line about at right angles to the street, twenty-nine feet to a point distant about one inch from the division line, and that the southwardly side of the complainant's dwelling-house extends southwardly, over the foundation wall, one or two inches. The answer insists that the complainant, by thus obstructing part of the alley with her building, abandoned all claim to the alley, and it admits that the defendants were, when the bill was filed, about to build a house on Mrs. Cook's lot, the northeastwardly corner whereof (on York street) would be within three inches of the dividing line and the northwesterly corner about eight inches therefrom; the building to extend back thirty-three feet from the street.

It will have been seen that the only defence set up by the answer is that the complainant has forfeited all right to the alley by building upon it. On the hearing, another defence was urged, viz., that the destruction of the two buildings by fire destroyed the easement.

The alley has been used by the complainant and those under whom she claims for over forty years, without interruption, and without intermission, except for the time (about six months) which intervened between the destruction of the building on her

Chew v. Cook.

lot by fire, and the reconstruction thereof. It has been used so long that a grant of the reciprocal right to use for the alley so much of the land of each of the parties as is within the lines of the alley, is to be presumed. The alley has not only been used as a way to and from the rear of the complainant's house, but it has been recognized and used as such by the owners of Mrs. Cook's lot. Under the circumstances a grant must be presumed to the owner of each lot, of an easement in that part of the passage-way which is upon the other lot. *Barnes v. Haynes*, 13 Gray 188; *Miller v. Garlock*, 8 Barb. 153; *Townsend v. Bissell*, 6 Thomp. & C. 565. Nor did the complainant lose her right by the destruction of her house by fire. Nor was it lost by the destruction of both houses. The cases cited by the defendants' counsel do not lay down the doctrine that such an easement is lost by the destruction of the buildings. Almost all of them have reference to party walls.

The question to be decided is whether the new house was built on the foundation of the old one; that is, whether the complainant has, by her own act, deprived herself of all claim to the easement in Mrs. Cook's land by withdrawing her land from the joint use and rendering the mutual and reciprocal use impossible.

The complainant alleges, and has endeavored to prove, that her house was rebuilt exactly on the old foundation. The defendants, on the other hand, allege, and have undertaken to prove, that the complainant, in reconstructing her house, while she left about sixteen feet in length of the easterly end of her southerly foundation wall as it was before the fire, built that wall at the westerly end about two feet further south than it was before, and extended it about thirteen feet, to a point about twenty-nine feet westwardly from York street, and about one inch northwardly from the division line, so that the southerly side of the house is, at York street, about two feet and six inches northwardly from the division line, and thence runs in a straight line nearly at right angles with the street about twenty-nine feet westwardly, to a point about one inch from the division line. I am unable, upon the evidence submitted, to determine whether the com-

Gulick v. Gulick.

plainant's house was set exactly, or nearly so, upon the foundation of the old one, or not. The testimony is extremely conflicting and contradictory, and is otherwise unsatisfactory.

An issue at law will be ordered to ascertain how the fact is, and the cause will stand over for decision until the coming in of the verdict.

MARY F. GULICK

v.

WILLIAM GULICK.

A husband conveyed lands to his wife, to hold in trust (evidenced by deed) for his benefit during his lifetime, and thereafter to sell the lands and divide the proceeds among his widow, should she survive him, and their children or grandchildren.—*Held*, that the husband and wife could not substitute for the trust as to those lands another trust, so as to affect the interests of the children and grandchildren.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. F. Hageman, Jr., and *Mr. J. F. Hageman, Sr.*, for complainant.

Mr. G. O. Vanderbilt and *Mr. J. H. Stewart*, for defendant.

THE CHANCELLOR.

This suit is brought by a wife against her husband, to obtain relief from the consequences of his failure to discharge his obligations as life-tenant of a farm of one hundred and forty acres, near Princeton, the legal title to which she holds. The tenancy was created, as she alleges, under a declaration of trust set out in the bill and executed by her. She seeks also, by this suit, to compel him to furnish her a proper support; she alleging that he has not only not provided proper maintenance for her but

Gulick v. Gulick.

has absented himself from his home, and left her without money and without the necessaries of life. The defendant, by his answer, denies that the declaration of trust set out in the bill is the true one, but alleges that it was substituted for the true declaration by fraud upon him, and he sets forth the instrument, which he says is the true one, for which it was substituted, and prays (answering on that head by way of cross-bill) that it may be established as the declaration of trust executed by the complainant concerning the farm. He also says that he has provided for the complainant support from April, 1883, according to her own proposition in that behalf, and that after furnishing that support he has not had the means to pay the interest upon the mortgage (of \$8,000,) upon the property, in consequence whereof suit for foreclosure has been instituted.

The facts in regard to the declaration of trust are as follows: The defendant, in June, 1878, was the owner of the farm. He then desired to transfer the title to his wife, the complainant. One of the reasons which he gave for so doing was, that he wanted to secure her for money which she had brought to him on or after their marriage (which took place in 1846), and another was his determination to put the property out of the reach of a certain creditor or creditors of his. An arrangement was made between him and the complainant that he should convey the property to their son-in-law, Charles H. Olden, who should then convey it to her, to be held on certain trusts agreed upon between the complainant and defendant; and that she should thereupon execute a declaration of those trusts. The deeds of conveyance and declaration were drawn accordingly, and the deed from the defendant to Olden and the declaration of trust were executed at or about the same time. They are both dated June 17th, 1878, and the deed appears to have been acknowledged on that day, but the declaration was not acknowledged until two days later. The execution of the conveyance from Olden to the complainant was delayed for some reason (perhaps his absence or illness), so that the deed was not signed by him until the 26th of July following. Afterwards the defendant discovered that in the declaration of trust the date of that

Gulick v. Gulick.

conveyance was erroneously stated to be the 17th of June, instead of the 26th of July, and he was desirous of having it corrected. At his request the complainant applied to the lawyer by whom the declaration was drawn, and requested him to make the requisite alteration, but he declined to do so, and recommended that a new one be drawn. Before another was drawn, the complainant, being about to leave home temporarily, hid the declaration and the deed from Olden, under the carpet, in one of the rooms of their house, and when it was wanted for the purpose of drawing a new one she had forgotten what she had done with it, and it therefore could not be produced. In the fall of 1878, the defendant, being about to leave this state to go West with their son, who was ill, called upon the lawyer, and requested him to draw a new declaration in place of that which was lost; the new one to be precisely like the other. The complainant declined to sign a new one exactly like the original, but insisted on a change in respect to what she was under the trust to receive from the property in case she should survive the defendant. The trust declared in the original instrument was that she would hold the farm in trust; first, for the use and benefit of the defendant during his life, subject to the conditions thereafter expressed; second, upon his death to sell it, and divide the net proceeds as follows: one-third to be retained by her, and the other two-thirds to be equally divided among their children (the children of any deceased child to take the parent's share), but in case any of the children should have received an advance from the defendant of any portion of his estate, or should be indebted to him, the advance or indebtedness should be deducted from such child's share; third, in case the complainant should predecease the defendant, the use, interest and profits of the farm should enure to the defendant for his life or until he should remarry; and in case of his remarriage, he should have one-third of the use, benefits and profits, and the children the other two-thirds, and at his death the children should receive the whole farm in fee; fourth, in case the complainant should survive the defendant, and should marry again, she should be entitled to only the one-third of the use or proceeds of the farm for life,

Gulick v. Gulick.

and at her death that third should go to the children in fee ; and fifth, to sell or exchange the farm for other property in the joint lives of the complainant and defendant, as they might agree. The instrument declared, also, that in order to carry out the trusts the complainant should be at liberty to provide by her last will and testament for the execution of any of them that should be unexecuted, and like power was given to the defendant should he survive her. The second or new instrument declared that the complainant held, and would continue to hold, the farm in trust for the benefit of the defendant, who should be at liberty to occupy it for his lifetime or until sale as thereafter mentioned, for the maintenance of his family, and to receive the rents, issues and profits thereof, but must pay the taxes and keep the property in good repair ; and that at his death the complainant should sell it (unless she, with a majority of the children, should agree in writing that the sale should be postponed, and in such case she and such of the children as should be without homes might remain in the occupancy of the farm until it should be sold), and when the farm should be sold and any mortgage debt subsisting as a lien thereon should have been paid, she should set apart from the proceeds of the sale \$6,000 for her own use for her life or widowhood, to be disposed of as she should see fit, in case she should not marry again ; but that in case of her marriage she should receive only the annual interest or income of that sum, and at her death the principal should be equally divided among their children, and that the balance remaining from the sale of the farm should be divided among the children equally, deducting from their respective shares the amount of any advancement which they should have received from their father in his lifetime or from her, in case she should see fit to enforce such deduction ; and that if she should die before the defendant, the title to the farm should vest absolutely in him, for life, and in the children after his decease ; but that he should have power, with the consent of a majority of the children, to sell the farm and receive the interest of the money arising from the sale for life, and that at his death the principal should go to the children. The instrument contained a provision that

Gulick v. Gulick.

nothing therein contained should prevent the defendant from revoking it and causing it to be canceled of record at his will, or to prevent the complainant and defendant from selling, mortgaging or conveying the farm, in case they should deem it best and desirable for them to do so.

The two instruments differ principally in this: that the first provides that the complainant shall, in case she survives the defendant, have one-third of the net proceeds of the sale of the property, while the other provides that in that case she shall have \$6,000. The first provides that in case the defendant survives the complainant and marries again, he shall have only one-third of the use of the property, the rest to go to the children. The other contains no such provision, but gives the defendant the whole of the use for life. The second contains a power to mortgage the farm, and also a power of revocation on the part of the defendant. The first contains neither. The evidence shows clearly that the complainant took advantage of the error in the first declaration, the loss of that instrument and the defendant's desire to have another in its place, to obtain a more satisfactory (and, as she thought, more just) arrangement—to compel him to consent to a change in the provisions of the instrument in her favor, and she thus constrained him, in order to get any declaration of trust at all, to agree, that at his death, in case she should survive him, she should have \$6,000 out of the proceeds of sale of the farm instead of one-third of those proceeds (the provision in the first instrument), which might be less than that sum. Though he denies that he agreed to the change, I am satisfied from the evidence that he did so in fact, though with much reluctance. The provision for mortgaging the farm, as well as that for the revocation of the trust by the defendant (not to speak of the other change against the interest of the children), might be destructive of all the interests of the children under the trust. Indeed, the defendant, under the power of the revocation, has, though protesting that the second declaration had no validity, revoked the trust under that instrument; and so, if the second declaration be, as the complainant insists it is, the true and only declaration, the

Gulick v. Gulick.

trust is wholly at an end, and the title to the farm is vested in her free from the trust. The defendant, however, by his answer by way of cross-bill, seeks to set up the first declaration as the true one. After the second one had been executed, the complainant found the first where she had concealed it for safety, as before mentioned. She cut off a piece containing her signature and seal, and putting it with the rest of the document, in an envelope, handed them to the lawyer by whom the declaration was drawn. He attached the piece to the instrument again, and laid the paper away in his office for reference, if necessary, as constituting part of the history of the transaction. The defendant having returned from the West, called on the lawyer at his office, to ascertain whether the second declaration (which he had with him) was like the first. The lawyer then produced the first, and after some conversation, including the reading of it over to the defendant, the defendant asked to see it. It was handed to him accordingly. He asked permission to take it, but was refused. Without leave, and without the knowledge of the lawyer, he took it away with him, however, leaving the second declaration on the table. The lawyer supposing that the paper which was left on the table was the first declaration, put it away accordingly, and did not ascertain that the defendant had made the exchange until the first was brought to him by the complainant, who had taken it from the post-office in Princeton, where it had come from Trenton in an envelope, addressed to the defendant, who had taken it to the county clerk's office, and had it recorded. After it was taken from the lawyer's office by the defendant, and before it was recorded, the word "June" in the statement in it of the dates of the deeds, in its own date, and in the date of the certificate of acknowledgment upon it, was altered, by some one, to "July."

The important question is whether the second instrument ever had any validity whatever. As before stated, it is now revoked. If the first declaration was a valid instrument, and was intended to operate, it was beyond the power of the complainant and defendant to alter it. They, of course, could, by agreement between them, make any alteration in its terms, so far as their own in-

Gulick v. Gulick.

terests under it were concerned, but they could not affect the rights which their children (and perhaps grandchildren) had acquired under it. The instrument purported to have been sealed and delivered, and the complainant acknowledged that she had signed, sealed and delivered it as her voluntary act and deed, for the uses and purposes therein expressed. Had it not been that it was thought that it would be ineffectual because of the misstatement which it contained, of the date of the deed to the complainant, and its being itself dated and acknowledged after the date of that deed, there would, probably, have been no other. The defendant sought merely to have the dates altered, so as to correct those errors. Finding, as he thought, that that was impracticable, he sought to have a new one, indeed, but the new one was, in its terms, to be just like it—merely a reproduction of it. And the new one would have been so, had it not been that the complainant, the declaration then being lost, as she said, refused to sign such new one, or to sign any unless the terms were made more favorable for her. The parties were in error, in supposing that the first declaration was rendered invalid by the misstatement therein of the date of the deed from Olden to the complainant, or by the fact that that deed had not been executed when the declaration of trust was signed, or by the fact that the date of the latter was prior to that of the former. The declaration could have been rectified in equity, if necessary, and it could have been enforced without rectification. The instrument being a valid declaration of the trust, it was not in the power of the complainant and defendant, by their own consent alone, to revoke or alter it to the prejudice of the other *cestuis que trust*. The children had acquired rights under it, of which the complainant and defendant could not deprive them, by revoking or altering the instrument. The grandchildren had also acquired contingent rights under it. If a voluntary trust, in which the settlor has reserved no power of revocation, is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, though the settlor has destroyed the deed, or has attempted to revoke it by making a second voluntary settlement of the same property, or if the estate,

Gulick v. Gulick.

by some accident, becomes revested in the settlor. In all these cases, the first perfectly created trust will be upheld with all its consequences, and the settlor will be declared to be a trustee. Nor is notice to the *cestui que trust*, or to the trustee, and acceptance by him, essential to the validity of a voluntary trust, if it is otherwise perfectly created. *Perry on Trusts* §§ 104, 105; *Isham v. D., L. & W. R. R. Co.*, 3 *Stock*. 227; 2 *Spence's Eq. Jur.* 881, 882.

The first declaration of trust is therefore still in force, and it will be so decreed. As equitable life-tenant, the defendant was bound to keep down the interest on the mortgage upon the farm, if the rents and profits were sufficient for the purpose. They were, I am satisfied, enough to enable him to do that, and pay the taxes and keep the premises in good repair. By his refusal to discharge this duty, he has brought about a foreclosure suit upon the mortgage under the execution issued on the decree, in which the property has been advertised to be sold by the sheriff, and it would have been sold before this time had not this court ordered a postponement, to give time to decide this cause. There will be a receiver appointed to take charge of the property, and apply the rents and profits, so far as necessary, to the payment of the interest on the mortgage and the costs of the foreclosure, if by such means the sale can be prevented and the property saved. If not, it will be ordered that the surplus money from the sale be brought into court, to be disposed of as equity may require.

The complainant seeks, by the bill, to compel the defendant to provide her with proper support and maintenance. The bill alleges that he not only has refused to provide a proper maintenance for her, but has left her without the necessities of life.

This court has jurisdiction, by statute, to decree alimony where a husband abandons or separates himself from his wife without justifiable cause, and refuses or neglects to provide for and maintain her suitably. The allegations of the complainant that the defendant has so separated himself from and abandoned her, and has not made suitable provision for her support, are sustained by the proof. Indeed, the answer does not

American Dock and Improvement Co. v. Trustees of Public Schools.

deny the charge. The reason there given by the defendant for separating himself from her, is not justifiable cause. The defendant should be compelled, by the decree of this court, to provide for her a suitable support. What it shall be will be the subject of a reference. There will be a decree in accordance with the views expressed in this decision.

The defendant will be required to pay the costs of this suit, and also a suitable counsel fee for that part of the litigation which has reference to the alimony.

THE AMERICAN DOCK AND IMPROVEMENT CO. et al.

v.

THE TRUSTEES FOR THE SUPPORT OF PUBLIC SCHOOLS
et al.

1. A statute provided that any lands of the state under tide-water, or that might theretofore have been under tide-water, which should happen to come within the location of the route, or of the depots, stations or other works of a certain railroad company, or which should be needed therefor, should be paid for by the company to the trustees of the school fund of the state; that the boundaries and price thereof should be fixed by the riparian commissioners; that the price should be paid prior to any filling or improvement thereon authorized by the act, and that on such payment the title to the land should vest in the company in fee, and that a deed therefor might be made by the riparian commissioners, governor and attorney-general, in the name and under the great seal of the state.—*Held*, that on the trial of an action of ejectment, a deed under the great seal of the state, purporting to convey land of the state in pursuance of the statute, was, of itself, competent evidence, without proof, that the previous steps leading to the vesting of the title had been taken when the deed was made.

2. Also, that evidence offered by the defendants in the action to show that the lands conveyed by the deed did not come within the location of the road or of the depots, stations or other works of the company, was properly excluded.

3. The pre-emption given by the eighth section of the riparian act of 1860, to the riparian owner, is of grace, and not of right.

4. The thirteenth section of that act was designed for the benefit of riparian

American Dock and Improvement Co. v. Trustees of Public Schools.

owners who, after notice, neglected to apply for the grant, and the grant has consequently been made to some one else, and the right of the riparian owner to compensation is by the act made to depend upon whether, in law, he had such a right or interest as would make compensation to him necessary in order to enable the state to make the grant.

5. The legislature had the power to rescind the provision for pre-emption, and in the case of the West Line grant it did so by the special grant above mentioned. It had also the power to repeal the provision for compensation.

6. The West Line grant was not in violation of the constitutional prerogative of congress to regulate commerce with foreign nations and among the several states.

7. Where both parties claim under a grant from the state, the question whether congress has jurisdiction is neither material nor pertinent.

8. A railroad company may buy land in fee and hold it, and if the company becomes insolvent the property will be assets for the payment of its debts.

9. If the property, by reason of forfeiture, revert to the state, it alone can take advantage thereof.

10. Where the facts are undisputed, and the cause is to be decided upon mere questions of law, it is not error for the court to direct the jury what verdict to find.

Bill for relief. On motion on behalf of complainants to set aside the verdict rendered on the trial of the issue at law, and motion on the part of the receiver of the West Line Railroad Company for a final decree upon the verdict.

Charge of the court by *Depue, J.*:

This suit is an issue out of the court of chancery. The chancellor directed that the issue should be "Whether the New Jersey West Line Railroad Company, at and after the date of the delivery of the deed from the state of New Jersey to said company, referred to in the pleadings in this cause, which was on or about the 19th day of March, A. D. 1872, had the legal title and right of possession to all or any part of the land described in and purporting to be conveyed by the said deed; and if only to a part, to what part."

The order of the chancellor, and the statute in virtue of which it was made, both contemplate the trial, upon such an issue, of the legal title in accordance with the rules and practice of courts of law for the determination of titles to land.

A careful examination of the case has led to the conclusion

American Dock and Improvement Co. v. Trustees of Public Schools.

that there are no disputed questions of fact material to this issue which I can submit to the finding of the jury. I cannot find in the case made here any question arising under this issue except questions of law to be decided by the court. The counsel have so treated the case in their summing up.

The property in controversy is of considerable value, and the legal questions discussed by counsel are of the utmost importance. If this were an ordinary issue out of the supreme court, I would take a special verdict, or direct a verdict under formal instructions, and leave the decision of the case to the supreme court. But that course of procedure is not open to me in the trial of this issue. The chancellor has defined the issue, and has directed that it be tried in this court, and the only return that can be made to the court of chancery is a certificate of the finding of the issue at a trial in this court. The situation of the case has put upon me the duty to decide here upon the rules of law that are supposed to enter into the settlement of the title to the premises in dispute, and upon the application of those rules to the facts of this case. My endeavor will be to present the case with such directness that if I fall into any error in either respect, the error will manifest itself when the proceedings are brought under review; so that in any event the necessity for a retrial may be obviated.

The premises lie between the original line of high water of Communipaw bay and the centre line of Washington street extended. They comprise lands lying between high and low water, and also lands below low water, extending out into the bay into deep water.

Before considering the claims of title of the parties respectively, it will be useful to state the rights of the state in property so situated.

By the common law of England, the title to lands under tidal waters, below the line of ordinary high water, was vested in the crown. In such lands the king had a double right—a right of jurisdiction for the purposes of government, and a right of property and ownership—the former as part of the prerogatives of

American Dock and Improvement Co. v. Trustees of Public Schools.

the king as sovereign, the latter as part of the *jura regalia* of the crown.

These rights in lands under tide waters in the province of East Jersey were granted by Charles II. to the Duke of York by the charters of 1664 and 1674, and the land or soil under such waters passed to the Duke of York, to be held by him in the same manner as the soil under the navigable waters of England was held by the crown. These rights, as well the right of property in the soil under tidal waters as the right of sovereignty, were transferred by the Duke of York to the proprietors, and by the surrender in 1702 were restored to the crown; and when the people of New Jersey took possession of the government and assumed the powers of sovereignty, the prerogatives and *jura regalia*, which before belonged to the crown or to parliament, became immediately vested in the state. Among the rights of the crown to which the state succeeded was the right of property in the soil under tidal waters, and the title of the state in such lands is proprietary in its fullest sense, including the power to grant and convey them to individuals, to be held in private ownership. *Martin v. Waddell*, 16 Pet. 367; *Den, Russell, v. Jersey Company*, 15 How. 426; *Arnold v. Mundy*, 1 Hal. 1; *Gough v. Bell*, 2 Zab. 441, 3 Id. 624; *Stevens v. P. & N. R. R. Co.*, 5 Vr. 532.

In *Gough v. Bell* the courts of the state, while affirming the title of the state in tidal waters below ordinary high-water mark, held that, by a local common law, the riparian owner—*i. e.*, the owner of lands bounded on tidal waters—might extend his improvements by wharves or filling up over the shore between high and low-water mark, unless prevented by the state; and that when he had so improved or reclaimed the shore, his title would extend to actual high-water mark. But this right of acquiring property in lands under tidal waters by improvement or reclamation was restrained within the limit of the ordinary low-water mark. In *Townsend v. Brown*, 4 Zab. 80, 85, Chief-Justice Green said that it had never been supposed or imagined that there was or could be, within this state, independent of leg-

American Dock and Improvement Co. v. Trustees of Public Schools.

islative grant, any individual ownership in the soil of the sea, or of the arms of the sea below low-water mark.

This right of the riparian owner to improve, and by reclamation to acquire a title, was not only limited to the space between ordinary high water and ordinary low water, but was also a mere license, revocable at the will of the legislature, which became irrevocable only when the license had been executed and the riparian owner had effected the reclamation. Before the reclamation was actually made the state might convey its lands to any one, either for public or private use, without making compensation to the riparian owner in front of whose lands the conveyance was made. *Stevens v. P. & N. R. R. Co.*, *supra*; *N. Y., L. E. & W. R. Co. v. Yard*, 14 Vr. 632-636.

In 1851, the legislature regulated the subject by a statute commonly known as the Wharf act. By the first section of that act, it provided that it should be lawful for the owner of lands situate along or upon tide waters, to build docks or wharves upon the shore in front of his lands, and in any other way to improve the same, and when so built upon or improved, to appropriate the same to his own exclusive right. By the eleventh section, it defined the term "shore," as used in the act, to be the land between the limits of ordinary high and low water. By other sections, provision was made for enabling the riparian owner to build docks, wharves and piers in front of his land beyond the limits of ordinary low water, by a license to be granted by the board of chosen freeholders of the county in which the lands lay. This statute did not create any property rights in the riparian property-owner in lands fronting on his land. It conferred a mere license, revocable at the will of the legislature before improvement actually made under the privilege granted. *State, Roberts, v. Jersey City*, 1 Dutch. 525; *Stevens v. P. & N. R. Co.*, *supra*.

The wharf act of 1851 continued in force until the 31st of March, 1869, when the second riparian act was passed. It was not repealed or suspended by the riparian act of April 11th, 1864. By the riparian act of 1869, the wharf act was repealed as to the tide waters of the Hudson river, New York bay and

American Dock and Improvement Co. v. Trustees of Public Schools.

the Kill von Kull, and it was declared that such repeal should not be construed to restore any supposed usage, right, custom or local common law founded upon the tacit consent of the state or otherwise, to fill in any land under water below mean high tide, and that, without a grant or permission of the riparian commissioners, no person or corporation should fill in, build upon, or make any erections on, or reclaim any of the land under the tide waters within the limits above mentioned.

The repealing act of 1869, in its third section, provided that nothing in the act contained should operate to repeal or impair certain grants of land under water, or rights to reclaim, or to erect or build docks, wharves and piers which had been given by legislative acts, nor to impair any revocable license granted by the board of freeholders under the act of 1851, so far as the lands under water had been reclaimed or built upon under such licenses.

The act of 1869 authorized the riparian commissioners to make grants of lands under waters which had not been improved, and had not been authorized to be improved, under any grant or license protected by the provisions of the act; to designate the lands for which a grant is desired; to fix the price or annual rentals; to certify the boundaries, and to make conveyance therefor in the name of the state and under the great seal of the state.

This act also contained two provisions for the benefit of riparian owners. A proviso in the eighth section enacted that no grant or license should be granted to any other than a riparian proprietor until six calendar months after the riparian proprietors should have been personally notified in writing by the applicant for such grant or license, and should have neglected to apply for the grant or license, and to pay, or secure to be paid, the price that said commissioners had fixed. By this section the option to apply for and have a grant at the price fixed by the commissioners on the application of other persons—the pre-emption, so called—was given to the riparian owner as riparian owner, irrespective of the question of any rights on his part. The thirteenth section provided that, where a grant was made by

American Dock and Improvement Co. v. Trustees of Public Schools.

the commissioners to any other person than the riparian owner, the state's grantees were forbidden to fill up or improve the lands until the rights and interests of the riparian owner (if any he has) should be extinguished; and provision was made for the valuation of the rights and interests of the riparian owner (if any he has), on the payment of which his right and interest should be extinguished. This section was designed for the benefit of a riparian owner who, on notice given, had neglected to apply for the grant as he might have done under the eighth section, and the grant had therefore been made to some one else. And the right of such riparian owner to compensation was not given to him simply because he is riparian owner. His right to compensation in that event was made to depend upon whether, in law, he had such a right or interest as would make compensation to him necessary to enable the state to make the grant.

Enough has been said to show that the titles of these parties respectively to the premises in dispute to be subjected to examination, must be title derived from the state. The provisions of the wharf and riparian acts I have referred to will be needed in the investigation of the subject.

The plaintiff makes title under a grant by the state to the New Jersey West Line Railroad Company.

The defendants have no specific grant from the state for the premises. They claim title (1) as riparian owners; (2) under the wharf act of 1851; (3) under the act of 1860, authorizing the extension of the Central railroad; (4) under the act of 1864, incorporating the American Dock and Improvement Company.

By a supplement to its charter, passed February 29th, 1872, the West Line company was authorized to extend its railroad from its prior terminus in Essex county, "to some point in line with the most exterior line for solid filling, established in the Hudson river by the act of 1869, commonly called the Riparian Commission Act." The ninth section enacts:

"That any lands of the state under tide water, or that have heretofore been under tide water, which shall happen to come within the location of the route, or of the depots, stations or other works of the company, or shall be needed therefor, shall be paid for by the company to the trustees of the school fund of

American Dock and Improvement Co. v. Trustees of Public Schools.

this state; and the boundaries and price thereof shall be fixed by the riparian commissioners, on application for that purpose to them, and shall be paid as aforesaid, prior to any filling or improvement thereon herein authorized; and on such payment thereof, the title to such land shall vest in said company in fee simple, and a deed therefor may be made by said commissioners, governor and attorney-general, in the name and under the great seal of the state."

The deed of grant purports to have been made in pursuance of this section. It is under the great seal of the state, and signed by the governor, the attorney-general and the riparian commissioners. It is expressed in the formal language of common law grants, granting and conveying the premises to the West Line company, its successors and assigns, forever—that is, in fee simple. The deed is dated March 19th, 1872. It was acknowledged by the riparian commissioners May 20th, 1872, and deposited for record May 27th, 1872.

The cases are not agreed as to whether a deed will be presumed to have been delivered as of its date, or as of the date of the subsequent acknowledgment. The question happens to be of no importance at this time. If exact time was material, and the West Line grant was to be considered as a revocation of a license, I would be inclined to hold that it became operative, as such, only from the time of notice. Actual notice of the grant was given to the two corporation defendants on the 25th of May, 1872.

The deed recites that the premises granted and conveyed—

"Lie, in part, under tide water, and in part heretofore lay under tide-water, and happened to come within the location of the route, and of the depots, stations and other works of said company, and are needed therefor."

That the said commissioners, pursuant to the said ninth section, "and on application of said company," have fixed the boundaries as they are hereinafter described, and the price of such lands at the sum of \$125,000; and that the said company have, pursuant to the directions of said act, paid to the trustees of the school fund of the state the said sum; and thereupon grants &c., to said company—

American Dock and Improvement Co. v. Trustees of Public Schools.

"All that certain tract of land, in part under tide water, and in part heretofore under tide water, in Jersey City, in the county of Hudson, and state of New Jersey"—[describing the premises as in the declaration.]

The ninth section of the West Line charter is not of itself a grant; but it is manifest that the legislature contemplated that the lands granted might be in the location adopted. That, I think, is apparent from the description of the authorized extension of the company's railroad, "to some point in line with the most exterior line for solid filling," as contained in the first section—from the restriction on the company, contained in the second proviso in the fourth section, which exactly fits on the grant as made, and from the fact that the legislature, by an act passed at the same session as the West Line supplement, and approved April 4th, 1872, established a public basin, conforming in its southerly line to the West Line grant, and by another act, approved the same day, authorized the riparian commissioners "to make changes in any basin now fixed and established"—a provision suited to clear the way for the West Line grant—the same having been located almost entirely within the basin delineated on the commissioners' map of 1865.

The defendants contest this grant (1) on the ground of its own inherent invalidity, and (2) on the ground that they had previously acquired rights in the premises which disabled the state from making the grant.

The contentions under the first head are—

First. That the grant to the West Line company is in violation of the constitutional prerogative of congress to regulate commerce, and its jurisdiction over navigable waters capable of being used for foreign or inter-state commerce. Ever since the decision of *Wilson v. Black Bird Creek Co.*, 2 Pet. 245, it has been regarded as settled that the power of congress does not exclude the jurisdiction of the state over navigable waters within its boundaries, and that a state law on this subject is not invalid, unless congress has acted and the state law is in conflict with the congressional regulations or interferes with the rights which are permitted by them. I do not consider the several acts of congress cited, making appropriations for the improvement of New

American Dock and Improvement Co. v. Trustees of Public Schools.

York harbor, as congressional legislation of such a character as would conflict with the right of the state to make the grant.

Second. That the conditions on which the legislature authorized the grant were not complied with. I admitted the grant in evidence without proof that the conditions were complied with, and excluded evidence that the company's location was such as not to justify the grant. I adhere to the views then expressed. The conditions were such as concerned only the state. The state selected its officers as the persons to ascertain whether the conditions on which the grant was authorized existed, and empowered them to make a deed in the name of and under the great seal of the state, as evidence of the grant. The deed so authenticated executed the grant. If there was any deception or fraud in procuring this grant, relief is exclusively at the instance of the state, either by *scire facias* to vacate the grant, or by entry, or by a subsequent grant of the same premises. *Field v. Seabury*, 19 How. 323; *White v. Burnley*, 20 How. 235; *Spencer v. Lapsley*, 20 How. 264; *Schulenberg v. Harriman*, 21 Wall. 44-62; *Farnsworth v. M. & P. R. R. Co.*, 92 U. S. 49-66; 4 Abb. Dig. 750, tit. "*Patents for Lands*" § 1. The defendants are not in position to represent the state in such a proceeding.

Third. That the grant to the West Line company has become inoperative by reason of the forfeiture of its charter. The sixth section of the original charter, passed March 29th, 1865, provided that, if the railroad thereby authorized should not be completed at the expiration of ten years from the 1st day of July then next, the act should be void, except as to the part completed. The company completed only a small portion of the road originally authorized, and has done nothing on the extension except to take a grant of these lands. The limitation was reached in July, 1875. The limitation had not expired in 1872, when this grant was made. The grant was made on a consideration paid, and it was expressly provided that, on compliance with the conditions—all of which were precedent to the consummation of the grant—the title should vest in fee simple. If the title which so vested became forfeited and lapsed by matters *ex post facto*, the land, if not held in trust for creditors and stock-

American Dock and Improvement Co. v. Trustees of Public Schools.

holders, reverted to the state, and proceedings to enforce the forfeiture and resume the title could be taken only by the state. *Farnsworth v. M. & P. R. R. Co.*, *supra*.

Nor will the fact that the West Line company has since become insolvent, and its franchises have been sold to purchasers who have re-organized, defeat the grant. On the dissolution of a corporation, its property constitutes a trust fund for the payment of debts and stockholders. *Boone on Corp.* 207; *Rev. p. 187* § 59. And if, by the extinguishment of the corporate existence of the company, the project for which the state allowed this grant is dissipated, and the condition implied from the grant broken, so that the lands revert, the remedy to recall the grant is with the state. Nor does the question arise whether the legal title to the lands vested in the receiver. The chancellor selected the parties in whose names the issue should be tried. He might have selected fictitious or nominal parties for the purpose. For convenience, he made the receivers of the two corporations parties to stand upon the record.

Fourth. That the West Line grant was made in violation of the right of pre-emption conferred on riparian proprietors by the proviso in the eighth section of the riparian act of 1869. The defendants, or some of them, are owners of the *ripa* from the sugar-house around to the lands on which the Central railroad is constructed. Their ownership includes the *ripa* at the shore-end of the West Line grant, and the whole *ripa* adjacent on the northerly side of the grant. No question of apportionment, as between the several owners of *ripa* on a bay or cove, arises; and it is admitted that no notice of the application for the grant, and no option, was given to them to purchase for the price fixed. On the argument, I intimated to counsel that that right could not be litigated in this case; that the remedy was in equity. *Johnson v. Towsley*, 13 Wall. 72-83; *Sampson v. Smiley*, *Id.* 91, give countenance to that view. Subsequent reflection has brought me to a different conclusion. The conditions the state has imposed upon its riparian commissioners are conditions precedent; unlike the conditions for making the West Line grant, they are conditions for the benefit of riparian proprietors, and the legis-

American Dock and Improvement Co. v. Trustees of Public Schools.

lature has prescribed that no grant shall be made to any other than a riparian proprietor unless these conditions have been complied with. The first section of the limitation act of 1789 provided that no new survey, within the reputed boundary of lands, should be of any avail, unless it should be made to appear that the possessor of such lands, holding the same by survey, deed or otherwise, had been notified for the space of six months previous to the making of such survey of the intention to make it, and had refused or neglected to re-survey and cover such overplus land. *Rev. p. 599 § 27.* And it has always been considered that the person entitled to this pre-emption might defend at law on the ground of want of notice. I think that, under the chancellor's order for this issue, such of the defendants as are riparian owners may contest the West Line grant here on the ground referred to.

The question, then, arises whether a grant such as was made to the West Line company, is subject to the conditions to which grants by the riparian commissioners, under the act of 1869, were subjected by the eighth section of that act. That the benefits conferred on riparian proprietors by that section are revocable at legislative will is apparent from the reasoning of the chief-justice in the Stevens case. The legislature might, therefore, authorize a special grant of lands under water not in conformity with the requirements of that act. *The Yosemite Valley Case, 15 Wall. 77.* I think the West Line grant is a grant of that character. The act of 1869 is a general act, designed to facilitate the sale of lands of the state under water simply for public revenue, and indifferently to any one who desired to purchase. In such a scheme the legislature very properly preferred the riparian owner, who was willing to pay the price, to any other purchaser, and therefore gave the riparian owner the preference and the option to buy at the price fixed. The lands comprised in the West Line grant consisted, in great part, of lands that had been withdrawn from sale and set apart for public use—lands which were outside of the exterior lines and within the basin delineated on the commissioners' map of 1865.

The act of 1872, under which the West Line grant was made,

American Dock and Improvement Co. v. Trustees of Public Schools.

is a special act—a supplement to the company's charter. Its object was not to put lands previously withdrawn from sale in the market, to be sold to augment the public revenues. It was designed exclusively to aid the West Line company, by enabling it to purchase lands of the state in order to get an outlet on tide waters. It authorized a grant to that company, and to that company only, and made the location of its route or of its depots, stations or other works, the need therefor of the lands selected, and the payment of the price fixed, the conditions on which the title thereto should vest. The taking of the lands selected for that purpose by any one else than the company, would defeat the legislative purpose in this respect. The legislative intent, by the act of 1872, cannot be made to harmonize with the legislative plan for the sale of the state's lands adopted by the act of 1869. The two acts cannot stand together, and therefore the act of 1869 is subject to that rule of construction that a general statute must give way to a special statute, so far as the provisions of the latter are inconsistent with the former. *Industrial School District v. Whitehead*, 2 Beas. 290; *Jersey City v. J. C. & B. H. R. R. Co.*, 5 C. E. Gr. 360.

I have now examined the several objections made to the West Line grant, and find no infirmity in the grant which would impair its validity as a grant, if the state had the power to make it.

The defendants contend that the state had no such power. They insist that they had previously acquired rights in the premises, which prevented the state from making the grant. I will now consider the grounds on which this contention rests. In making the investigation, I will confine myself to the issue of legal title. If there be equities which will overcome and subordinate the legal title, they remain in the court of chancery for its disposition.

The Central Railroad Company, by a supplement to its charter, passed February 20th, 1860, was authorized to extend its railroad from the city of Elizabeth "to some point or points on New York bay, in the county of Hudson, at or south of Jersey City." On the 27th of April, 1863, the company filed a location of the

American Dock and Improvement Co. v. Trustees of Public Schools.

route of its extension, to a point near Communipaw road. This location did not reach New York bay, nor the shore of Communipaw bay. On May 19th, 1863, the company filed another location, from the ending point of the location last named, to a point on the channel of the Hudson river, about eight hundred and ninety-two feet easterly of the centre of Hudson street produced. The route adopted by these locations was on a line at right angles to the shore of Communipaw bay, and extended about five thousand five hundred feet from the shore line. The terminal point was within the boundaries of Jersey City. This line of location was parallel with and four hundred and fifty feet south of the southerly line of the West Line grant. The company began the construction of its railroad over Communipaw bay, on its located route, in June, 1863. In August, 1864, the work was in such a condition that the company began to run passenger trains to the bulkhead, at the bay front, to connect with ferryboats running to New York city.

The American Dock and Improvement Company was incorporated April 11th, 1864. At that date the Central Railroad Company had acquired the whole of the shore front between Communipaw lane and lands of Gilbert, Hodges and Hoy, known in this case as the Hoy tract, and also considerable portions of the shore front between Communipaw lane and the sugar-house lot, between Washington and Warren streets, in Jersey City. Between April 11th, 1864, and October, 1866, the Central Railroad Company acquired the title of the riparian-owners between the limits last mentioned, with the exception of a lot belonging to one Arbuckle, which he conveyed to the dock company on the 2d of October, 1866—except that the railroad company had acquired only an undivided one-half interest in so much of the shore front of the Jane Van Horne tract as lay north of the one hundred feet which the company purchased of her for its track. The location of this Van Horne tract appears on Mr. Clark's map, Exhibit No. 64.

By two deeds of conveyance, bearing date September 24th, 1866, and October 15th, 1866, the Central Railroad Company conveyed all its shore front to the dock company—taking back

American Dock and Improvement Co. v. Trustees of Public Schools.

from the dock company a deed for a strip of land one thousand and eighty feet wide, being the strip on which the tracks of the Central railroad leading to the bulkhead in front were laid. The northerly line of this strip is coincident with the southerly line of the West Line grant. The two deeds of October 15th, 1866—the one from the Central Railroad Company to the dock company, the other from the dock company to the Central Railroad Company—were parts of one agreement between the two companies, and are to be regarded as one transaction.

The situation of the title to the *ripa* after the conveyance of October 15th, 1866, was this, viz.: Jane Van Horne and the dock company were joint owners of so much of the *ripa* as lay between the middle of Mill creek and the southern line of the shore end of the West Line grant. The Central Railroad Company was the owner of the tract one thousand and eighty feet wide, before mentioned, which lay next south of the southerly line of the West Line grant, and the dock company was owner of all the rest of the *ripa*, extending from the sugar-house around to Cavan Point.

A short time prior to the conveyances of October 15th, 1866, the Central Railroad Company had become the owner of the entire capital stock of the dock company, and the officers and managers of the two companies were the same persons.

At a meeting of the directors of the Central Railroad Company of October 15th, 1866—the same meeting which authorized the conveyance—it appears by the minutes that “a plan and map for the improvement of the property of the two companies was submitted and approved;” and at a meeting of the directors of the dock company of November 9th, 1866, similar action was taken by them.

Prior to the arrangement of October, 1866, the Central Railroad Company projected a general plan of improvement in Communipaw bay, which was modified by changes and additions from time to time. The details of this plan appear on Clark's map, Exhibit No. 64. In the latter part of 1866, I think in December, the company adopted a plan for a basin. This basin includes part of the lands embraced in the West Line grant. Its

American Dock and Improvement Co. v. Trustees of Public Schools.

southerly line is one hundred and eighty feet north of the southerly line of the West Line grant, and its northerly line is two hundred feet north of the northerly line of the West Line grant. The location of this basin and of the West Line grant, the basin of 1865, and the tide-water basin of 1872, appears on Map F.

After the arrangement of October, 1866, work was begun for the construction of this basin, and before March 19th, 1872, the date of the West Line grant, considerable had been done towards accomplishing that object, by sinking cribs and dredging out within the lines of the cribs. The location and condition of these cribs appear on Map P, with the dates when the several parts of the cribbing were begun and completed. It is apparent from this map and the testimony that, in March, 1872, so much had been done towards the construction of this basin and the appropriation of the lands within it, that, if the work was done under a license from the state, the license had at that time been so far executed as to have become irrevocable. The work was done under the auspices of the two companies, and avowedly under the charter of the dock company. On the 26th of February, 1867, the Central Railroad Company filed a location of a branch of its railroad upon the cribwork, on the northerly side of this basin.

In addition to the work I have just referred to, there was also work done in West Central avenue, west of Jersey avenue, by filling in, part above and part below the line of low water. This work is designated on Map N as "No. 4." It was done between 1863 and October, 1868, and is within the extreme southerly line of the West Line grant. This work appears to have been done by the Central Railroad Company under an agreement with Jane Van Horne.

The reclamation in West Central avenue, which I have just referred to, was effected while the wharf act of 1851 was in force. On the principles I have stated, the riparian owner acquired an indefeasible title to so much of the land so filled in and reclaimed as lay above ordinary low water. It contains twenty-seven hundredths of an acre. The description of this parcel appears on Exhibit 91.

For the lands between high and low-water mark, not reclaimed

American Dock and Improvement Co. v. Trustees of Public Schools.

when the wharf act was repealed, and all the lands improved below low-water mark, the defendants have no title unless the improvements upon them were made under some grant or license emanating from the state. The defendants make their claim of right therein under the act of 1860, authorizing the extension of the Central railroad, and the act of 1864, incorporating the dock company. On the construction of these two statutes the defendants' right to the premises just mentioned depends. The problem is whether, in these two legislative acts, or either of them, there is any grant, or, what is the same thing, license executed, which is applicable to the lands in controversy.

Public grants, whether they be of lands or franchises, are strictly construed. Herein public grants differ from grants between private persons. Grants between individuals are construed favorably for the grantee. Public grants are construed most favorably for the public and against the grantee. The grantee takes nothing not clearly given.

The construction of such grants as applied to public lands arises in two classes of cases. First, where the legislature has granted to a corporation a franchise which is a unit, such as for the construction of a railroad between two designated points. In such cases the grant of the franchise will, under some circumstances, carry with it, by implication, power to interfere with other public rights, and the right to use public property, without any special grant to that effect. Thus, in *Attorney-General v. Stevens, Sax. 370*, the defendants had the power to lay out and construct a railroad from the Delaware river, at some point or points between Cooper's creek and Newton creek, to some point or points on Raritan bay, and the power to build bridges; but no express authority was given to erect bridges over navigable streams. Chancellor Vroom held that the construction of bridges over navigable streams between the termini being necessary to effect the object of the incorporation, the power to construct them was given by necessary implication. In a more recent case, Chancellor Zabriskie held that an act authorizing a railroad company to extend its railroad across the Raritan river by a bridge, gave the company a right to use the lands of the

American Dock and Improvement Co. v. Trustees of Public Schools.

state under water for the purpose of constructing the bridge. *P. R. R. Co. v. N. Y. & L. B. R. R. Co.*, 8 C. E. Gr. 157. The principle on which cases of this class were decided is, that the legislature, having designated the beginning and ending points, indicated a purpose to empower the construction of a railroad between the designated points, and lands of the state lying intermediate between those points, not being subject to condemnation under the usual powers to condemn, the whole project would be defeated if such lands could not be used without a condemnation being effected. But this right to use public lands arising from an implication created by necessity, arises only in cases of necessity, and is restricted within the limits of the necessity. Chief-Justice Beasley, speaking on this subject in a case of this kind, said that "the state is never presumed to have parted with any of its property in the absence of conclusive proof of an intention to do so; such proof must exist either in express terms or in necessary implications." *Stevens v. P. & N. R. R. Co.*, 5 Vr. 532, 553.

The other class of cases is that in which an individual, or, what is the same thing, a corporation created to hold and improve lands, with franchises adapted to the purposes for which the corporation was created, claims title to public lands under a grant from the public. In such cases the grant is most strictly construed, and the grantee takes nothing that is not expressly given. The earlier English cases are cited in the opinion of the United States Supreme Court, in *United States v. Arredondo*, 6 Pet. 691, 738. A later case in the same court is so pertinent to this subject, both in its facts and in the principles of construction adopted, that I will content myself with a reference to it. An act of congress enacted—

"That there be * * * granted to the territory of Iowa, for the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to Raccoon Fork, * * * one equal moiety * * * of the public lands * * * in a strip five miles in width on each side of said river."

The question was whether this grant gave the territory one

American Dock and Improvement Co. v. Trustees of Public Schools.

moiety of all the lands on both sides of the river up to its source, or was confined to lands lying between the fork of the river and its mouth. The court held the latter, and Mr. Justice Davis, delivering the opinion, said: "All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed, they cannot be implied." *Dubuque & P. R. R. Co. v. Litchfield*, 23 How. 66-88. Equally explicit is the language of Chief-Justice Green, in *Townsend v. Brown*, 4 Zab. 80, and of the Master, in *Morris Canal and Banking Co. v. C. R. R. Co.*, 1 C. E. Gr. 419; and the general doctrine to the same effect, as applicable to all public grants, is stated by the chancellor in *D. & R. Canal Co. v. R. & D. B. R. R. Co.*, 1 C. E. Gr. 321, and by Mr. Justice Van Syckel, in *Black v. D. & R. Canal Co.*, 9 C. E. Gr. 455.

The act of 1860, authorizing the extension of the Central railroad, is an act of the class first mentioned. It provided that for the purpose of the extension in its construction, completion, maintenance, use and enjoyment, all and every provision of the original act, which was passed February 26th, 1847, and is entitled "An act to incorporate the Somerville and Easton Railroad Company," and of the several supplements thereto, should extend and be applicable to the railroad authorized to be constructed, in every respect, as if the same had been originally authorized under the said act. By section 7 of the supplement of 1854, it was made lawful for the company to alter the location of its railroad, or to locate new lines when additional tracks should be required, at any point or points between Phillipsburg and Elizabethport, not varying, in any case, over one mile from the line as located and filed; and by the first section of that supplement it was made lawful for the company to—

"Erect, build or extend such wharves, docks or piers opposite to and adjoining any lands owned by them, in the township of Elizabeth, as far in the sound or bay as may be necessary for the purposes of facilitating the transhipment

American Dock and Improvement Co. v. Trustees of Public Schools.

of coal, and their general transporting business ; and also to have and hold whatever wharves, piers, lands or lots, steamboats, sailing vessels, and such other facilities, in the city of New York, or elsewhere, as may be necessary for the management of their business."

It is obvious that no grant of lands of the state can be implied from the company's power to locate and construct branch roads. It is only where a terminus *ad quem* is fixed by the legislature, to reach which lands of the state are necessary, that a grant by implication ever arises. If a grant of lands of the state would be implied from such a power to construct branch roads, the company could, with the consent of riparian owners, take for that purpose any of the state's lands in the counties of Hudson and Union, which lie within one mile of its main track. No precedent can be found, in which it has been held that a grant of public lands has been implied from a grant of corporate powers expressed in general and indefinite terms. The cases are all the other way.

Nor will a grant of lands of the state be implied from the grant of powers with respect to wharves, docks and piers contained in the first section of the act of 1854. The power to *erect, build or extend* wharves, docks and piers in that section, is restricted to such structures opposite to and adjoining lands owned by the company at Elizabethport. The residue of the power is simply *to have and to hold* wharves, piers, lands or lots, steamboats, sailing vessels and other facilities in the city of New York or elsewhere, necessary for the management of its business—a grant of franchises only.

The company's right to occupy lands of the state in this locality must therefore be found in the terms in which the extension of its railroad was expressed in the act of 1860. The terminus designated was "some point or points on New York bay, in the county of Hudson, at or south of Jersey City." The route located by the location of May, 1863, extended over Communipaw bay a considerable distance, and the ending point of the location was in Jersey City. The location conformed to the legislative description. If it was unfairly made, the state had remedy by injunction. *Attorney-General v. Stevens, supra.* The

American Dock and Improvement Co. v. Trustees of Public Schools.

company began the construction of the road in 1863 and completed it in 1864. In 1870 the state intervened by an information filed by the attorney-general. Pending the information suit, it would not be proper, nor is it necessary, for me to express any opinion as to the legality of that location or of the rights of the company in the lands occupied in the construction of its track under the location. The line of this location is four hundred and fifty feet south of the West Line grant. In October, 1866, the company conveyed all its lands in that locality to the dock company, taking back a deed for a strip one thousand and eighty feet wide, extending to the bulkhead in front. The northerly line of this strip is coincident with the southerly line of the West Line grant. This strip of land is amply sufficient to answer the needs of the company of the means of access with its railroad to the terminus, on the channel of the Hudson river; and the necessity which raises a grant by implication circumscribes the bounds of the grant implied.

The two locations of April 27th and May 19th, 1863, are together a location of the extension of the company's railroad from Bayonne to the channel of the Hudson river. They are so described in the certificates filed. The company having located the line of its extension by the two locations last named, and completed its road and put it in use, its power in that respect was exhausted. *Morris & E. R. R. v. C. R. R. Co.*, 2 Vr. 205. The subsequent location of February 26th, 1867, was not a change in the location of the main line of the extension. It was a location of branch tracks, and is so described in the certificate filed; and, as I have already said, the grant of power to construct branch tracks is not so expressed as to carry with it by implication a grant of public lands for that purpose.

I come now to the charter of the American Dock and Improvement Company. This charter was granted April 11th, 1864. The eighth section provides—

“That, unless the aforesaid improvement shall be commenced within one year from the passage of this act, then this act shall be null and void.”

It was insisted that this act had been avoided by the failure

American Dock and Improvement Co. v. Trustees of Public Schools.

of the company to begin the improvement within the year. The point was not taken until the evidence had been closed. If the point were tenable, I would open the case for further evidence on the subject. The year expired April 11th, 1865. The commissioners to measure the shore front granted to the company, were appointed by the governor on the 28th of August, 1865, and the state received the consideration money of the grant in November, 1866. Besides that, the fourth section of the riparian act of 1869 unmistakably recognizes the existence of the dock company. The state may waive the condition; and if it does, third persons cannot complain. *State v. G. & P. Road Co.*, 15 Vr. 496. From these acts I think a waiver may be inferred. Nor was the charter of the dock company suspended or affected by the riparian acts of 1864 and 1869. Its rights, whatever they were, as conferred by its charter, were saved by the provisos in the second section of the act of 1864, and the third section of the act of 1869, that no provision in the act should "in anywise repeal or impair any grant of land under water or right to reclaim made directly by legislative act," and the succeeding words in that proviso. The rights of the dock company under its charter still subsist, and the question is only one of construction.

The dock company was incorporated for the benefit and advantage of the corporators; that is apparent from the preamble of the act and its provisions throughout, especially by the seventh section, which gives the company a right to make wharfage and dockage charges. The interest of the public in the execution of the company's works was incidental—just such an interest as the public always has in improvements for public convenience and private emolument, made either by private or corporate enterprise. Its charter is a grant of the class secondly above named, and must be construed by the rules of construction applicable to such grants.

The preamble recites that—

"Whereas, it is represented that John S. Gilbert, Preston H. Hodges, James Hoy, Henry L. Gilbert and Moses B. Bramhall, and others their associates, now own certain tracts of land situate in the townships of Bergen and Greenville, in the county of Hudson, and desire to acquire from the state other tracts

American Dock and Improvement Co. v. Trustees of Public Schools.

of land contiguous thereto, covered by water, which they desire to fill in and reclaim from the water, and to divide into suitable building and other lots, and to sell and dispose of the same for the benefit of the association, with the object of erecting a town, with docks, wharves and bulkheads, so as to afford facilities to secure to this state a portion of the commerce and shipping of the city of New York; and whereas, it is necessary for the success of their undertaking that they should be able to convey the said premises, from time to time, to such persons as may be desirous to purchase, notwithstanding death or other cause affecting the individuals owning or who may own the said land, and in order to give greater efficiency and concentration to their efforts for the improvement of the said land."

By the second section the persons named in the preamble, and such persons as they may associate with them, are incorporated in the name of the American Dock and Improvement Company.

Section 5 provides—

"That as soon as the said company shall be organized, it shall be authorized to receive conveyances for the lands now owned as aforesaid between the south line of the lands of 'The Central Railroad Company of New Jersey,' where it intersects the New York bay and Cavan Point, and to hold and execute all instruments and conveyances necessary for the purchasing, leasing or selling of such property; and the said company are hereby authorized to purchase and hold any lands adjoining or near the above-mentioned tracts, which they may deem necessary for improving and enlarging said property, and to pay for all lands with the shares of its capital stock, at such price as the company may deem best for its interest; *provided*, that they shall not hold, at any time, over two hundred acres, above the present high-water mark, in addition to the tracts mentioned in this section."

By section 6 it is enacted—

"That the said company shall be, and hereby are, authorized to improve all and every portion of the said lands under water held or purchased by them as aforesaid, by erecting buildings and laying out said lands into lots, streets, squares, docks, lanes, alleys or other divisions, and by leveling, grading, raising or tunneling the said land, streets, lanes and alleys; and they shall have liberty to fill up, raise, occupy, possess and enjoy as their own property, all lands covered with water which they may hold or purchase, or which may lie in front of any lands which they may hold or purchase, and may build, enlarge or improve (or sell and convey to others to improve) all and any land or lands under water, wharf or wharves, bulkhead or bulkheads, piers, slips and other structures which they may deem necessary for commercial, shipping or other purposes; *provided*, that in carrying out the provisions of this act,

American Dock and Improvement Co. v. Trustees of Public Schools.

they shall not injure the navigation of the Hudson river, nor interfere with the legal rights of others, nor build out beyond the easterly line of Hudson street, in Jersey City, extending southerly, or such other exterior line as may be fixed by law, and that the southerly line of the said improvement into the bay shall be on a line commencing on the southerly side of Cavan Point, at the boundary line of lands of late belonging to Stephen B. Vreeland, and at the point where said boundary line strikes the shore of New York bay, and from thence, running south forty-six degrees and thirty-nine minutes east, to the channel of the Hudson river; *provided*, that the northerly line shall be parallel to and with the said southerly line."

A proviso annexed to this section provides—

"That nothing contained in this act shall be so construed as to give the said company any power to make any improvement whatever upon the tract of land under water in New York bay, heretofore granted to Aaron Ogden, without the consent, in writing, of the said Aaron Ogden, or his legal representatives."

The eleventh section provides—

"That the said company shall pay to the treasurer of this state, on or before the 1st day of July, A. D. 1885, the sum of \$25 for each and every foot of the shore embraced and contained in this bill, the amount of the same to be ascertained by a commission to be appointed by the governor, and the extent of the shore front is to be ascertained and measured as follows: Commencing at a point on the southerly side of Cavan Point, at the boundary line of lands, of late, belonging to Stephen B. Vreeland, and at the point where said boundary line strikes the shore of the New York bay, and thence northerly in a straight line to the south line of the lands of the Central Railroad Company of New Jersey, where it intersects the New York bay; and upon the aggregate amount so ascertained as aforesaid, the said company shall pay to the state interest from the 1st day of July, 1865, at the rate of six per centum per annum, payable semi-annually; and the said aggregate amount so ascertained as aforesaid shall be and remain a lien upon said lands until the payment of the same with the interest thereon; and a certificate of the said commissioners, signed by them and the president of said company, of the measurement of the shore line made as aforesaid, shall be filed in the office of the secretary of state."

The twelfth section declared that payment of a proportionate part of the purchase-money referred to in the eleventh section, should release from the lien therefor a corresponding proportionate part of "the lands under water, embraced and contained in this bill."

American Dock and Improvement Co. v. Trustees of Public Schools.

The contention of the defendants is that the dock company, by its charter, acquired by actual grant the lands of the state under water between Cavan Point and the south line of the lands of the Central Railroad Company at Van Horne's creek, lying between the lines delineated on Map C as the northerly and southerly lines of the grant, and, in addition thereto, the power to purchase other lands not within the limits mentioned, with a license to improve and appropriate to its own use all lands covered with water lying in front of any lands the company might hold or purchase; and that, the license having been executed by the improvement and appropriation of the *locus in quo*, before the grant to the West Line company, the title of the dock company to the premises became fixed, and could not be impaired by a subsequent grant by the state.

The eleventh section of the charter of the dock company, in fixing the compensation to be paid to the state for "the shore embraced and contained in this bill," required that the extent of the shore front should be ascertained and measured, commencing at a point on the southerly side of Cavan Point, at the boundary line of lands of late belonging to Stephen B. Vreeland; thence northeasterly in a straight line to the south line of the lands of the Central Railroad Company. The Central Railroad Company, at that time, owned all the lands along the shore between Communipaw lane and Van Horne creek, and the northern terminus of the measurement, as well as the northerly line of the grant, was as definitely fixed by the reference to lands of the Central Railroad Company as if the reference had been to a fixed monument. The commissioners, measuring between those points, ascertained the length to be four thousand five hundred and eighty-nine feet, and reported the same to the governor, with a map. The consideration of the grant—\$25 a foot on this measurement, amounting to \$114,715—the dock company paid in November, 1866, with the interest thereon.

The West Line grant is, at its nearest point, distant three thousand six hundred and sixty-five feet from the northerly point of the measurement of the dock grant by the commissioners; and between the West Line grant and the lands measured, is the

American Dock and Improvement Co. v. Trustees of Public Schools.

tract of the Central Railroad Company, one thousand and eighty feet wide, which, at the shore point, is seven hundred and thirty feet wide, and is used by the Central Railroad Company for its track and other railroad purposes. The dock company claims that, by its charter, it obtained a license to reclaim and improve, for its own benefit, lands of the state under water as far north of the bounds of its actual grant as to include the location of the West Line grant, comprising between the shore line and the exterior line of the riparian commissioners, several hundred acres of lands under water, and that, having regard to the basis on which the consideration for the grant was estimated, this license to reclaim and appropriate lands of the state was given as a gratuity. A claim of such magnitude against the state should not be supported on doubtful or ambiguous words. *Townsend v. Brown*, 4 Zab. 80. To adopt the language of the supreme court of the United States, the right must be so clearly defined that there can be no question of the purpose of the legislature to confer it. *Leavenworth R. R. Co. v. United States*, 92 U. S. 733.

The dock company's claim of right in this respect rests upon the fifth and sixth sections of its charter. The fifth section, after authorizing the company to receive conveyances for lands then owned as aforesaid (that is, by the promoters of the company) between the south line of lands of the Central Railroad Company and Cavan Point, enacted that "the said company are hereby authorized to purchase and hold any lands *adjoining* or *near* the above-mentioned tracts which they may deem necessary for improving and enlarging said property." The sixth section authorizes the company to improve all and every portion of the said lands under water held or purchased by them as aforesaid, by erecting buildings, laying out streets &c., and further, enacts that "they shall have liberty to fill up, raise, occupy, possess and enjoy as their own, all lands covered with water which they may hold or purchase, or which may lie in front of any lands which they may hold or purchase."

It is manifest that the foundation of the dock company's right in these premises rests on the words of the fifth section—"to

purchase and hold any lands *adjoining* or *near* the tracts above mentioned ;” for the power given to the company by the sixth section to improve and acquire, by improvement, lands of the state, by reclamation and improvement, must be applied to such lands as the company was expressly authorized, in its charter, to purchase and hold. It cannot be so wide in its scope as to apply to lands which any corporation, by the general corporation law, is authorized to take and hold.

The words “adjoining or near,” in the grant of power to purchase and hold, in the fifth section, are the words which give signification to the company’s present claim. The word “adjoining” is wholly inapplicable to the lands in the West Line grant—separated, as the latter is, from the lands of the dock company, by a strip of land of considerable width, belonging to the Central Railroad Company, and essential for the use of that company for railroad purposes. The word “near” is a relative term, having no positive or precise meaning, and its import can be determined only by surrounding facts and circumstances. 2 *Abb. Law Dict.* p. 156 tit. “Near.”

The whole strip of land between Cavan Point and Van Horne creek once belonged to Stephen Vreeland. In 1848 an act was passed, authorizing him to build a dock or wharf in front of his lands, at Cavan Point, a sufficient distance into the bay for the accommodation of vessels navigating the same. *P. L. of 1848 p. 75.* In 1849, on his petition representing that, owing to continual encroachments of the waters of the bay, his landmarks had been destroyed, the legislature passed an act appointing commissioners to ascertain the metes and bounds of his lands covered by the waters of the bay, and declaring that their report should be evidence, so far as concerned the state, of his title to the lands designated and mapped out as belonging to him. The commissioners’ map (Exhibit No. 78) shows that the lines designated were considerably below ordinary high water. On the 11th of April, 1864, when the act incorporating the dock company was passed, Gilbert and Hodges, two of the corporators named in the act, owned the undivided one-half part of the tract lying across the boundary line of the townships of Bergen and Greenville ;

American Dock and Improvement Co. v. Trustees of Public Schools.

and Hoy, another corporator, owned the other undivided half. This tract is marked in red on Map C, and comprises about one-half of the shore front between Van Horne creek and Cavan Point. The shore front between the latter tract and Cavan Point was owned by Andrew Clerk, to whom it had been conveyed by Nicholas L. Vreeland and Stephen B. Vreeland, in separate parcels—Nicholas owning the shore front next to the tract in red, and Stephen owning from the lands of Nicholas to Cavan Point. In front of these lands, and within the lines indicated in the charter of the dock company, there was a tract of ten acres of land under water, which the state, in 1837, had granted to Aaron Ogden by metes and bounds. There were then, at the time this charter was passed, lands within the lines mentioned in that act, to which the words “adjoining or near” were appropriate, and the dock company, in fact, subsequently acquired title to those lands by conveyances—from Andrew Clerk for the two Vreeland tracts, and from Cornelison for the Ogden tract.

I think there are also indications in this act of a legislative intent adverse to the claim of right now made under it. The preamble recites that the individuals named and others, their associates, “now own certain tracts of land, situate” &c., “and desire to acquire from the state other tracts of land *contiguous thereto*, covered by water.” It contains no other allusion to rights in the lands of the state; and for every foot of land the state granted, it exacted a price—\$25 a foot; and by the proviso in the sixth section following, and therefore qualifying the words I have already quoted from that section, it is provided that the southerly line of said *improvement into the bay* shall be on a line commencing on the southerly side of Cavan Point, at a point where the boundary line of lands late of Stephen Vreeland strikes the shore; and from thence running south, forty-six degrees and thirty-nine minutes east, to the channel of the Hudson river; and that the northerly line shall be parallel to and with the said southerly line. The location of this northerly line is fixed at the south line of lands of the Central Railroad Company. The designation of these lines by a fixed course indicates

American Dock and Improvement Co. v. Trustees of Public Schools.

a purpose to establish boundaries, and to limit the rights granted within prescribed bounds. That purpose is further indicated in the eleventh section, which provides that \$25 shall be paid "for each foot of shore *embraced* and *contained* in this bill," and that the extent of the shore front is to be *ascertained* and *measured* between the designated points. This section made the price a lien "*upon the said lands*" until payment be made; and the twelfth section declares that payment of a proportionate part of the price should release from the lien a corresponding proportionate part of "*the lands under water embraced in this bill.*"

Every word contained in the grant of power to purchase and hold lands for the purpose of improving and enlarging the property of the corporators will be satisfied by purchases within the boundaries designated in the act; and I do not find in the act that clear expression of intent that the company might, by purchases from shore-owners outside of those limits, appropriate lands of the state beyond those expressly granted, which is necessary to create such a right against the state, and to enable the company to take the state's lands to an indefinite extent without making any compensation for them; especially when the legislature indicated an intention not to donate, but to sell to the company, lands of the state at a fixed price per foot.

On the best consideration I could give this case, in the time afforded, I have reached the conclusions I have above stated. If my judgment upon the legal rights of these parties is erroneous, I have at least put the case in a shape convenient for review.

To give effect to the views of the court, you should find a verdict for the plaintiff, and that the New Jersey West Line Railroad Company took title and a right of possession to the lands described in its grant, except for that part in West Central avenue which was between the lines of high and low water, the description of which is set out in Exhibit No. 91.

Mr. J. W. Taylor and *Mr. James E. Gowen*, of Pennsylvania, for complainants.

Mr. R. Gilchrist and *Mr. T. N. McCarter*, for the receiver of the West Line R. R. Co.

American Dock and Improvement Co. v. Trustees of Public Schools.

THE CHANCELLOR.

The grounds on which the complainants' claim to relief is based are so fully stated in the opinion of the court of errors and appeals in this case (*8 Stew. Eq. 181*), and in the charge of the justice who presided at the trial of the issue at law, that it would be entirely superfluous to restate them here at any length. The land in question in this suit is a tract known as the West Line Grant, formerly wholly under the waters of Communipaw bay. The complainants claim it as riparian owners, and insist that their title as such was recognized, fortified and established by the wharf act of 1851. They also claim title acquired by them, as they allege, under the act of 1860, authorizing the extension of the Central railroad, and under the act of incorporation of the American Dock and Improvement Company, passed in 1860. They also claim title by estoppel. The opposing title, that under which the property is claimed in behalf of or under the West Line Railroad Company, rests wholly upon a special grant from the state contained in the ninth section of the supplement to the charter of the West Line company (which supplement was passed in 1872), and in a deed made, as is claimed, under and in execution of the authority of that section. The question presented by the issue at law was whether the West Line Railroad Company, at and after the delivery of the deed from the state to it, had the legal title to and right of possession of all or any part of the land described in the deed; and if it had such title and right to part only, to what part it was so entitled. As to such facts as the judge at the trial held to be material, there was no dispute, and consequently, under his rulings as to the admissibility of evidence offered on the trial, there was no question of fact to be settled by the jury. He so charged accordingly. Under the charge they found a verdict in favor of the complainants, who were defendants in the issue, for a small part (two hundred and fifty-seven thousandths of an acre) of the land, and in favor of the receiver of the West Line company, who was the plaintiff in the issue, for the rest.

The complainants now move to set aside the verdict on several grounds, which will be stated in connection with the con-

American Dock and Improvement Co. v. Trustees of Public Schools.

sideration thereof. On the other hand, their adversaries not only resist the motion, but move, on notice, for a decree upon and in conformity with the verdict.

The first ground assigned for a new trial is that the judge erred in permitting the plaintiff in the issue to give in evidence the deed from the state to the West Line company without requiring proof that the lands described therein came within the location made by the company, and that the price of the land had been paid before the grant was made.

The authority for the grant is, as before stated, contained in the ninth section of the supplement of 1872 to the charter of the West Line company. That section provided that any lands of the state under tide water, or that might theretofore have been under tide water, which should happen to come within the location of the route or of the depots, stations or other works of the company or should be needed therefor, should be paid for by the company to the trustees of the school fund of the state; that the boundaries and price thereof should be fixed by the riparian commissioners, on application for that purpose to them; that the price should be paid prior to any filling or improvement thereon authorized by that section; that on such payment the title to the land should vest in the company in fee simple, and that a deed therefor might be made by the riparian commissioners, governor and attorney-general, in the name and under the great seal of the state. The deed recites that the land thereby conveyed lies, in part, under tide water, and part theretofore lay under tide water; that it happened to come within the location of the route, of the depots, stations and other works of the company, and was needed therefor; that the commissioners, pursuant to the above-quoted section, and on application of the company, had fixed the boundaries as they were thereafter described, and the price of the lands at \$125,000, and that the company had, pursuant to the directions of the act, paid that sum to the trustees of the school fund of the state; and it declared that the conveyance was made in consideration of those premises and of that sum of \$125,000 paid to the trustees of the school fund, the receipt whereof was thereby acknowledged and the company for-

American Dock and Improvement Co. v. Trustees of Public Schools.

ever released and discharged therefrom. It will be seen that the instrument declares that all the prerequisites to the grant have been complied with. The deed (which was under the great seal of the state) was of itself competent evidence, without proof, that the previous steps leading to the vesting of the title had been taken. *Brown v. Galloway, Pet. C. C. 291.*

The second ground is, that the judge refused to allow the defendants to offer evidence to show that the land conveyed by the deed did not come within the location of the road or of the depots, stations, or other works of the company. It may be remarked, in passing, that the land was granted by the act not merely in the contingency that it should happen to come within the location of the route, depots, stations or other works, but also in case it should be needed for any of those purposes. The act was of itself a grant of the land. It declared that the title to the land should, on certain conditions, vest in the company in fee. It provided also for the ascertainment of the boundaries and the fixing of the price, and to whom the price was to be paid, and also for the giving of a deed by the governor, attorney-general, and riparian commissioners, in the name and under the great seal of the state, for the property. The act was offered and received in evidence on the part of the plaintiff in the beginning of the trial. The defendants' counsel urge that evidence that the land was not within the location should have been admitted with a view to defeating the grant—to show want of authority to make the deed. But the evidence was not competent. In *Polk's Lessees v. Wendell, 9 Cranch 87 (1815)*, Chief-Justice Marshall, speaking in reference to a patent for land, says that every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself, and that it would therefore be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. He adds that there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated,

American Dock and Improvement Co. v. Trustees of Public Schools.

did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title was acquired might be examined; that in general a court of equity appears to be a tribunal better adapted to that object than a court of law; that on an ejectment the pleadings give no notice of latent defects of which the party means to avail himself, and should he be allowed to use them the holder of the elder grant might often be surprised; but that in equity, the specific points must be brought into view &c. He further says that, in general, equity is the more eligible tribunal for those questions, and that they ought to be excluded from a court of law. He adds that there are cases in which a grant is absolutely void, as where the state has no title to the thing granted, or where the officer has no authority to issue the grant; and that, in such cases, the validity of the title may be inquired into at law. The same doctrine is laid down in the recent cases of *Smelting Co. v. Kemp* (1881), 104 U. S. 636, and *Steel v. Smelting Co.* (1882), 106 U. S. 447. In the former case, the court says that the doctrine goes so far that if, in any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances exist. The court also says that a patent may be impeached collaterally in an action, and its operation, as a conveyance, defeated, by showing that the defendant had no jurisdiction to dispose of the lands; that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously disposed of to others. The court adds that in establishing any of those particulars, the judgment of the department is not assailed, nor is the regularity of the proceedings called into question, but the authority of the department to act at all is denied, and shown to have never existed. In the case in hand the act of the legislature was, as before stated, in itself a grant of the land in a certain contingency, and on a certain condition. There was authority to convey, provided the contingency existed, and the condition was performed. The former was that the land happened to come within the location of the company's road or works, or was needed therefor, and the condition was payment of the price, which was to be

American Dock and Improvement Co. v. Trustees of Public Schools.

fixed (as were the boundaries) by the riparian commissioners. Whether the contingency had happened or not, and the extent to which, if it had happened, the land of the state was to be taken under the authority given by the act, and what price was to be paid, were matters left, in the first instance, to the judgment of the commissioners, and were then to be adjudicated upon by those who were to give the deed—the governor, the attorney-general and the commissioners. The act, in other words, granted the land on payment of the price, leaving it to those who were to give the deed to determine whether the land was in the location of the route or works, or needed therefor, and what the boundaries should be declared to be, and what price should be paid, and whether it had been paid. In *Minter v. Crommelin*, 18 How. 37, it was held, in a case where title to an Indian reservation, which was to be forfeited by abandonment, was claimed by patent, that it was to be presumed that the secretary of the treasury had decided the fact of abandonment, and issued the order for sale. In this case the question as to whether the land had been disposed of by the state previously to the making of the grant, so that it had no title when the grant was made, was tried in the suit so far as it could be tried in a court of law, which, in an ejectment, can deal with legal titles alone. There was no error in the exclusion, on the trial of the issue, of the evidence offered to show that the land was not within the location.

The third ground of alleged error is, the refusal to permit the defendants to prove the amount of expenditures incurred in carrying out the entire system of improvements in Communi-paw bay according to the original plan adopted by them. The court permitted them to prove their expenditures upon the land in question; but they claim that they ought to have been permitted to show expenditures by them elsewhere, also in or towards the execution of a plan or project adopted by them for the reclamation and improvement of a large tract formerly wholly under tide water, to which they claim title, and of which the West Line grant is part. As a legal proposition, it is clear that reclamation of land under water in one place, would not give a

American Dock and Improvement Co. v. Trustees of Public Schools.

legal title to land under water elsewhere. The judge, therefore, properly refused to permit the defendants to prove such expenditure.

The fourth ground is, that the judge refused to permit the defendants to prove that from 1863 to 1872, the Central Railroad Company had reported annually, as part of the cost of its road, the cost of its work of reclamation and improvement in Communipaw cove, and had annually paid to the state a tax of one-half of one per cent. upon such cost so reported. The section of the supplement to the charter of the company pursuant to which the reports were made, and the tax paid, provides that the company shall annually report the cost of its road, and shall pay to the state a tax of one-half of one per cent. thereupon, and provides that no other tax or impost shall be levied or assessed upon the company. To include in the report of the cost of the road expenditures for reclamation and improvement of the great tract of land in Communipaw cove, without mentioning those expenditures, would obviously be no notice to the state that such expenditures had been made. Such expenditure was not in fact part of the cost of the road. If the expenditures had been distinctly and explicitly reported as expenditures for the reclamation and improvement of the land under water, the fact that the state had received the tax upon them under such circumstances would not have created a legal title to the land on which the expenditures had been made. The objection under consideration is therefore untenable.

The fifth objection is, that the judge erred in his charge in certain matters to which exceptions were taken which will now be considered. The first is the charge that the thirteenth section of the riparian act of 1869 was designed for the benefit of the riparian owner, who, after notice, had neglected to apply for the grant, and the grant had consequently been made to some one else. Also, that the right of the riparian owner to compensation in such case was by the act made to depend upon whether, in law, he had such a right or interest as would make compensation to him necessary in order to enable the state to make the grant.

The eighth and thirteenth sections contemplate the making of

American Dock and Improvement Co. v. Trustees of Public Schools.

a grant of the shore to some one else than the riparian owners; but out of regard to a natural and obvious equity, the eighth section gives such owner preference, as a purchaser, over any stranger, and the thirteenth provides for the protection of any right he may have in case the grant is made to a stranger. The eighth provides that no grant shall be made to a stranger unless the riparian owner, after six months' notice, shall have neglected to apply for a grant to himself, and pay, or secure to be paid, the price which the commission shall have fixed. The thirteenth provides that where the grant is made to a stranger, he shall not fill up or improve the lands granted until the rights and interest of the riparian owner in them (if any he has) shall be extinguished by compensation as provided for in that section. The title of the state to what is known as the shore is beyond all controversy. The provision for notice to the riparian owner before sale to a stranger, was not the result of a necessity, but was a gratuitous concession on the part of the state, which it had the power to withdraw at will. It was of grace and not of right. The provision for compensation to such owner was not a recognition of any absolute right or in cret on his part as such, for it is guarded by a qualification which forbids such a conclusion. Provision is made for compensation only in case the riparian owner has any rights or interest in the land granted. If it had been intended to be a recognition of the existence of the right of such owner to or in the land granted, the provision for compensation would have been unqualified, and the recognition clear and absolute. The legislature had the power to rescind the provision for pre-emption, and in the case in hand it did so by the special grant in the supplement of 1872 to the West Line charter. It had also the power to repeal the provision for compensation. The wharf act (of 1851) conferred only a license revocable at the will of the legislature at any time before improvement actually made. The riparian act of 1869 repealed the wharf act, so far as lands under the tide water of the Hudson river, New York bay and Kill von Kull were concerned, saving, however, any grant of land under water or right to reclaim, made directly by legislative act, or grant or license, power or authority

American Dock and Improvement Co. v. Trustees of Public Schools.

so made or given, to purchase, fill up, occupy, possess and enjoy lands covered with water, fronting and adjoining lands owned, or authorized to be owned, by the corporation or grantee or licensee in such legislative act mentioned, its, his or their representatives, grantee or assigns; saving, also, any grant or license, power or authority to erect or build docks, wharves and piers opposite and adjoining land owned, or authorized to be owned, by the corporation or grantee or licensee in the legislative act mentioned, its, his or their representatives, grantees or assigns theretofore made or given directly by legislative act, whether those acts were repealable or not; and saving, also, and making irrevocable, any revocable license given by the board of chosen freeholders of a county to build docks, wharves or piers, or to fill in or reclaim any lands under water in the New York bay, Hudson river, or Kill von Kull, so far as the land under water had been reclaimed or built upon under such revocable license; and it expressly provided that as to the future, such revocable license was thereby revoked, and that no occupation or reclamation of land under water without such legislative act or revocable license, should divert the title of the state or confer any rights upon the party who had reclaimed or who was in possession thereof. Any riparian owner who had reclaimed the shore in front of his land before the passage of that act, had legal title to the land reclaimed. After the passage of that act, reclamation in the places to which the act was applicable by a riparian owner having no special legislative authority, without the permission of the commissioners, conferred no legal title. As to the land under water in those places, the state, of course, if it still held legal title, had the power to make a special grant. The right or interest of the riparian owner, referred to in the thirteenth section of the riparian act, was the claim of adjacency, the right to reach tide water from his land. But that right was subsequently, in 1870, held not to interfere with the right of the state to sell the shore to a stranger. In *Stevens v. Paterson and Newark R. R. Co.*, 5 Vr. 532, it was held, in the court of errors and appeals, that the state could grant land in navigable water within its territorial limits, to any one without making com-

American Dock and Improvement Co. v. Trustees of Public Schools.

pensation to the riparian owner. Since that decision it is clear that, at law, the riparian owner who has not in fact reclaimed the land under water in front of his bank has, as riparian owner, no legal right to, or in respect to that land, which will prevent the state from granting it to any person, and that without any compensation to such owner.

The second ground of exception is as to that part of the charge which was an expression by the judge of an opinion derived from the consideration of the provisions of the West Line supplement, that the legislature, in the ninth section, contemplated the taking by the railroad company of the very land in dispute. That was a matter in no way material. It had no important bearing in the case. But the reasons presented by the judge for his opinion are persuasive, and tend, at least, to lead to the conclusion which he reached.

The third exception is to the charge that the grant to the West Line company was not in violation of the constitutional prerogative of congress to regulate commerce with foreign nations and among the several states. The judge said that ever since the decision in *Willson v. Blackbird Creek Co.*, 2 Pet. 245, it has been regarded as settled that the power of congress does not exclude the jurisdiction of the state over navigable waters within its boundaries, and that a state law on this subject is not invalid unless congress has acted and the state law is in conflict with the congressional regulations, or interferes with the rights which are permitted by them. He added that he did not consider certain acts of congress, making appropriations for the improvement of New York harbor, as congressional legislation of such a character as would conflict with the right of the state to make the grant. By the convention between this state and the state of New York (*Nix. Dig. p. 822*), it was agreed that this state should have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York and west of the middle of that part of Hudson river which lies between Manhattan island and New Jersey; and that this state should have exclusive jurisdiction of and over the wharves,

American Dock and Improvement Co. v. Trustees of Public Schools.

docks and improvements made and to be made on the shore of this state &c. That compact was approved in all its parts by congress, in 1834; the act of approval, however, containing a provision saving the jurisdiction of the United States in and over the islands or waters. The views expressed by the judge upon the matter under consideration, were a correct statement of the law on the subject. There is another consideration of such conclusive force as to deprive the objection of all weight. The complainants themselves claim the land in question, under title derived from the state, by grant express or implied, or by estoppel. Yet, though claiming under the state, they insist that the state never had any right to make a grant. The question in this suit is between rival claimants, who, on both sides, claim under the state, and in this controversy—as between them—the question whether congress has jurisdiction or not is neither material nor pertinent.

The fourth exception is to the charge, that it was unnecessary for the plaintiff in this issue to show that the conditions on which the grant of land in controversy was authorized, had been complied with, and that evidence to the contrary on the part of the defendants in the issue was inadmissible. This subject was dealt with and disposed of in the former part of this opinion, in the consideration of the first and second grounds.

The fifth and sixth exceptions are to the charge that the grant did not become inoperative by reason of the forfeiture of the charter of the West Line company.

The point of these objections is that inasmuch as by the charter of the West Line company it was provided that if the railroad should not be completed at the expiration of ten years from the 1st day of July, 1865, then and in that case (except as to the part constructed), the act should be void; and inasmuch as the period expired in 1875, and that part of the road which was located on the land in question was not then built; and inasmuch as the company has been declared insolvent and its franchises sold, and the grant was intended merely for the purposes

American Dock and Improvement Co. v. Trustees of Public Schools.

of the company, for the exercise of its franchises, the grant is, in view of these considerations, void.

The grant, though made to a railroad company and for its purposes, was in fee and for a consideration paid. If, under the circumstances, the land reverted to the state, it alone could take advantage thereof. The defendants could not do so. It cannot be doubted that if, instead of ceasing to exercise its franchises, the company had changed its route, land acquired by it in fee, for a consideration, for its original route, would have been held to be still its property in fee. A railroad company may buy land in fee and hold it, and, if it becomes insolvent, such property will be assets for the payment of its debts.

The remaining exceptions are to that part of the charge which relates to the construction of that part of the charter of the American Dock and Improvement Company which granted power to that company to purchase and hold any lands "adjoining or near" the tracts of land mentioned in the act as being then owned by the corporators, and to improve all and every portion of the lands under water held or purchased by it "as therein aforesaid," and granting it liberty to fill up, raise, occupy, possess and enjoy, as its own property, all lands covered with water which it might hold or purchase, or which might lie in front of any lands which it might hold or purchase &c.

The principle applied by the judge in construing these provisions was, that grants of this description are to be construed strictly against the grantees, and that the state is never presumed to have parted with any of its property in the absence of conclusive proof, either in express terms or by necessary implication, of its intention to do so.

The charge on the subject under consideration was correct. It was, in brief, that the grant of power to purchase under the charter will be satisfied by confining it to the lands between the limits fixed in the eleventh section, *i. e.*, between Cavan Point and the south line of the lands of the Central Railroad Company.

The remaining reasons are, that the verdict was the finding of the jury by direction of the judge (wherefore, it is insisted, the

issue was not, in fact, tried by a jury), and that the verdict was contrary to the evidence.

As before stated, there were no disputed facts. No fact that the judge permitted the parties to introduce was questioned. There was, therefore, no occasion for any deliberation by the jury as to those matters. There remained only questions of law, as to which it was the duty of the judge to instruct and direct them. He neither erred in his rulings upon the admissibility of the evidence offered, nor in his view of the law of the case. The verdict, therefore, is satisfactory to me as the finding of the state of the legal title to the premises in question. It will, therefore, be permitted to stand accordingly.

The defendants move for a decree upon the verdict. If the finding of the legal title were conclusive of the controversy, they would be entitled to such decree. But there still remains at least one matter of much importance to be determined, viz., whether the legal title must not give way to and follow the equitable one claimed by the complainants.

The question whether, since the decision in *Stevens v. Paterson and Newark R. R. Co.*, the riparian owner has a right of adjacency of which he may avail himself in equity as against a grant to a stranger, is yet to be considered. There may also be considerations in regard to the West Line grant, and its validity as against the complainants, which, though inadmissible in the trial of the issue at law, may have great weight here.

It was said by Chief-Justice Marshall, in *Polk's Lessees v. Wendell*, 9 Cranch 87, that while at law only certain defences may be set up to avoid a patent, in equity the defects in the title under such an instrument are the particular objects of investigation, and that that court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding the whole grant. The bill in this case, in addition to the claim of legal title, sets up one purely equitable, based upon equitable estoppel arising from the acquiescence of the state in the expenditure by the complainants of very large sums of money in reclaiming and improving the property. In that connection, the question whether improvements in

American Dock and Improvement Co. v. Trustees of Public Schools.

partial execution of a plan or project for reclaiming a tract of which the land in controversy formed part, although such improvements were not made upon that land, are to be considered in equity as if made there, would properly come up for consideration.

The bill expressly claims the benefit of the equity which arises where an owner of property has permitted another person to expend money upon it in improvements which have added to its value. It alleges that acting under their construction of their charters, the complainants have, with the knowledge and acquiescence of the state, expended very large sums in improving the land, and they therefore claim that in view of that fact, they ought, irrespective of their claims under their charters, to be held in equity to be the owners of the land. The principle upon the application of which they rely, has long been established. In *Pilling v. Armitage*, 12 Ves. 78, Sir William Grant, M. R., says: "There are different positions in the books with regard to the sort of equity arising from laying out money upon another's estate through inadvertence or mistake; that person seeing that, and not interfering to put the party upon his guard. The case with reference to which that proposition is ordinarily stated, is that of building upon another man's ground. That is a case which supposes a total absence of title on the one side; implying, therefore, that the act must be done of necessity, under the influence of mistake, and undoubtedly it may be expected that the party should advertise the other that he is acting under a mistake."

One reason for the principle is, that it is inequitable under the circumstances that one man should be profited at the expense of another. *Nemo debet locupletari ex alterius incommodo*. The doctrine is considered with favor, and the grounds of it stated by Judge Story in *Bright v. Boyd*, 1 Story C. C. 478. A notable instance of its application is to be found in *McKelway v. Armour*, 2 Stock. 115, where one upon whose land another had, by his own mistake alone (supposing the land to be his own property), built a house, was compelled to accept the alternative of conveying the land to the latter for due consideration, or paying for the

American Dock and Improvement Co. v. Trustees of Public Schools.

improvements. In the case under consideration, the legal title to the land when the improvements were made was in the state, and, according to the bill, the reclamation was made by the riparian owners, not only under the supposed authority of their charter, but under a claim of the right of adjacency. It is urged by the defendants that the title of the state could not be defeated or affected by those considerations because, as alleged, the reclamation was made after prohibitory notification on the part of the state. But there is no evidence before me on that head. The evidence taken on the trial of the issue at law is not before me for any purpose, except collaterally for the purpose of determining what weight is to be given to the verdict, and it is not evidence on the final hearing, there being no order that it stand as evidence in the cause. *Prudden v. Lindsley*, 2 Stew. Eq. 615.

Again it is argued that if such considerations could avail to defeat or affect the title of the state, they could not affect the title of the West Line company because, as alleged, they had no notice of the equity. There being no evidence whatever in the cause which can be used on the final hearing, it is impossible to adjudicate upon that subject at this time.

Both motions (for a new trial on the one side, and for a final decree upon the verdict on the other) will be denied, with costs

Beatty v. Trustees.

GEORGE B. BEATTY et al., executors,

v.

THE TRUSTEES OF THE CORY UNIVERSALIST SOCIETY et al.

THE TRUSTEES OF THE CORY UNIVERSALIST SOCIETY AT
SPARTA

v.

GEORGE B. BEATTY et al., executors.

1. Legatees mentioned in a will by the nicknames by which testator always called them, and identified, were held entitled to their respective legacies.

2. A provision that in case of the death of a certain legatee before majority, the legacy was "to revert back to" testator's "other lawful heirs," construed to mean that, in that event, the legacy should go to his children or their representatives.

3. Where executors filed a final account, charging themselves with a certain amount, the fact that a part of that amount consisted of securities, which they then supposed were good, but which they afterwards failed to collect, is not a mistake, for which they can obtain relief in equity six years thereafter, and especially so where the will directed the greater part of the legacies to be paid with the securities received by the executors from the testator, and some of those securities have been lost through the executors' delay and blunders in their attempts to collect them.

4. Executors' reasonable expenses of a suit in this court for the construction of the will, allowed, but not those in the court of appeals in the same case, the appeal therein having been taken by them, and being deemed unnecessary under the circumstances.

5. Executors, who instituted proceedings to be relieved from the amount charged against them in their final account, and who were refused relief therefrom, held liable to pay the costs of the suit, although they also asked incidentally for a construction of the will by the same bill.

Bills for relief. On final hearing on pleadings and proofs.

Mr. Thomas Kays, for the executors.

Beatty v. Trustees.

Mr. E. Q. Keasbey, for the trustees.

Mr. C. J. Roe, for Frank Roe and others.

THE CHANCELLOR.

David Cory, deceased, late of Sparta, in Sussex county, died October 14th, 1870, leaving a will dated January 1st, 1869, and a codicil thereto dated the 17th of February following. By the will he appointed his friends, George B. Beatty and James L. Munson, and his grandson, Francis C. Easton, executors, and by the codicil he appointed his son, Job Cory, an executor also. All the executors proved the will and codicil October 25th, 1870, and straightway entered upon the duties of their office, and have continued to act as executors ever since. On the same day on which the will was proved, they filed an inventory of the estate, by which it appeared that there had come to their hands, as executors, personal property to the value, as appraised, of \$108,111.92, of which sum \$2,196.51 were the appraised value of farm-stock, grain &c., and \$492.15 the value of household goods, and the rest, \$105,423.27, was the value of cash and securities for the payment of money. In this last amount was included the amount (\$1,439.29) of principal and interest of certain claims which were set down in the inventory as being doubtful. They were a note of Alfred Ackerson, and four notes made by J. B. Boss, but no other claims were so designated. So that according to the inventory, there came to their hands, on the death of the testator, cash and securities, considered by themselves and the appraisers to be good and collectible, to the amount of \$103,983.98.

By the will the testator gave to his wife, for life (in lieu of dower), his homestead farm, together with all the stock and movable property, including household furniture, but not notes or bonds and mortgages. To his grandson, Francis C. Easton, he then gave the farm (except a lot of about nine acres), for life, with remainder to the heirs of his body lawfully begotten, and gave the lot of nine acres, after his wife's death, to his, the testator's, son Job, in fee. He then declared it to be his will, and

Beatty v. Trustees.

ordered that Francis C. Easton should have all the before-mentioned movable property (except household goods) on or belonging to the farm, and the blacksmith's tools, after his wife's death; and he then ordered and directed that Easton pay, to his executors or their successors, \$3,000 after the decease of his wife (with interest), and within five years after he should have taken possession, which money he declared should be a lien on all the property until paid, and when paid the property was to be Easton's absolutely. He further ordered that after his decease, or the death of his wife, as the case might be, the movables given to Easton should be at Easton's disposal, on his paying \$1,500. The will declared that the gifts to Easton were upon the express condition that he should make no charge against the testator's estate for labor done, or services rendered to or for the testator during the testator's life, or that of his wife. The testator then gave to his son Job the farm called the Cox farm, on which the latter then lived, together with \$12,000 in notes, bonds and mortgages; the securities to be such as the executors should assign and deliver over to him. Then followed certain other bequests, viz.: To the testator's son, Thomas Cory, "and to his heirs," \$20,000; to the testator's daughter, "Marthy" Morrow, "and to her children," \$20,000; to his son, Charles Cory, \$4,000; to his daughter, Jane Easton, \$5,000, "and after her decease to her children;" to his granddaughters, Martha and Mary Easton, each \$500; to his granddaughter "Sharlotty" Cory, daughter of his deceased son Samuel, \$1,000, and to his two grandsons, Zophar and Samuel Cory, each \$1,000. He then gave to his three grandchildren, George, Francis and "Sharlotty," children of his deceased daughter, Eliza Roe, \$12,000, in equal shares, when they should arrive at the age of twenty-one years, and added—

"And further, I order that if any one of them should die before that time, then his or her share to go to the living; the last of these legacies named to remain in the hands of my executors or guardians appointed for that purpose, and be kept at interest for them until they shall arrive at the age above described."

He then gave to his granddaughter, "Caty" Roe, daughter of

Beatty v. Trustees.

his deceased daughter, Mary Roe, \$1,000, to be retained in the hands of his executors, or "their survivors," until she should arrive at the age of twenty-one years; and he added—

"But if she should die before that time, or die without issue, then and in that case that the legacy bequeathed to her revert back to my other lawful heirs."

Then followed a bequest of \$1,500, in equal shares to his three grandsons, Francis, William and "Yeany," sons of his son Job, when they should arrive at the age of twenty-one years, and the will adds, "to be kept at interest for them by guardians appointed for that purpose." After directing the sale of a wood-lot, the testator then directed as follows:

"It is my will, and I do order that all the above-stipulated legacies and bequests to be paid by my executors, or their survivors of them, to the above-named legatees, in notes, or bonds and mortgages transferred to them with the respective value at the time, by my executors or the survivors of them, excepting those that are not of age, as stated above; and if there shall be an over-plus after paying the stipulated legacies and debts, then I order that what remains to be paid or distributed to my lawful heirs."

After giving his wife leave to sell or dispose of the household goods as she should think best, he ordered his executors, or the survivors or survivor of them, to retain in their hands \$12,000, for the purpose of a trust to erect a building and establish a religious society. The trust was modified by the codicil so as not to require the erection of the building, but directing the payment of the money to certain persons in the codicil named after they should have established the society, and should have been incorporated to carry the object of the trust into effect. The codicil confirmed the will, except as to part of the trust, which it merely modified, and appointed Job Cory an executor.

As appears by the records of the orphans court of Sussex county, the joint final account of the executors was passed at the term of December, 1871, whereby they were charged with \$117,-531.48, and after crediting them not only with moneys paid, including legacies, but also with all legacies remaining unpaid and

Beatty v. Trustees.

their commissions and expenses of settling the account, there was a balance in their hands of \$6,299.93. In September, 1873, "The Trustees of the Cory Universalist Society at Sparta" filed their bill in this court to compel payment to them of the legacy of \$12,000 due to them under the will, with the interest thereon. George B. Beatty and James L. Munson, two of the executors, answered together, and the other two executors also answered together. The answers were filed in November, 1873, and both of them, although they denied the validity of the bequest, admitted that there were sufficient assets in the hands of the executors to pay the demand if the legacy should be established. It was established by decree of this court made in March, 1878. From that decree the executors appealed, and it was affirmed by the court of last resort at the term of November, 1879. By the decree, the executors were permitted to amend their answer by striking out the admission of assets and setting up deficiency thereof, but they having suggested that they could safely pay to the trustees \$3,000 on account of the legacy, it was ordered that they pay that sum accordingly, which was done. In May, 1878, they filed the bill in this cause for the construction of the will and for relief against the final account before mentioned. The latter branch will be first considered. The relief on that head is sought on the ground of mistake. The executors allege that the account (it is the only one they ever filed) was never intended to be the account of all of them, but only the account of two, Beatty and Easton, and that as such it was not intended to be final but only intermediate. The testimony of the surrogate, by whom the account was drawn up, and who gave the requisite notice for the executors, is very clear and positive on the subject. He swears that the executors were all present at the making out of the account, and that they agreed to have the account stated as a joint account, and he says he thinks he explained to them the difference between joint and separate accounts, as to their effect upon the accountants. He also testifies that Beatty, Munson and Cory, and he thinks Easton also, had been to his office previously to see him on the subject, and that they all appeared anxious to have the estate settled up; that he

Beatty v. Trustees.

saw the vouchers and that the balance was struck in the presence of the executors. That all of them knew that the account had been passed soon after it was done is evident from the fact that they divided among themselves the \$2,382.03 of commissions allowed them in the account. Their testimony is not such as to overcome that of the surrogate. He is an impartial witness. He was acting in a *quasi* official capacity in making up the account for them. He had no interest to subserve by deceiving them, and it does not appear that he did so. The fact that the account covers the transactions of all the executors is a circumstance of much weight against them on this point. It is enough to say that the account purports to be the joint account of the four, and it appears to have been filed, audited, stated, reported for settlement and passed as such many years (more than six) before the filing of their bill, and, as before stated, neither they, nor any of them, ever filed any other account. It must stand and be accepted here as and for what it purports to be, with all its consequences, unless fraud or mistake is shown. It is to be observed that it is not attacked by any legatee or distributee, but it is the executors themselves who are seeking to relieve themselves of the legal consequences of their own act. Inasmuch as the evidence does not establish the fact that they were induced by fraud to settle the account as a joint account, or to charge themselves therein with anything with which they ought not to have charged themselves, they must rely upon mistake—their own mistake—as the ground of relief. Now in what did the alleged mistake consist? To a great extent, in charging themselves with the amount of securities which they had not collected and which they then supposed to be good, but which they subsequently failed to collect. That, however, is not a mistake for which relief will be granted in such a case. *Voorhees v. Voorhees's Executors*, 3 C. E. Gr. 223, 228.

It may be imprudent for an executor so to make himself liable in his own estate for the amount of securities of the estate. It may be unwise for him thus to assume the risk of collection, but that is a matter which concerns himself alone and of which he himself must be the judge. If for any reason, or for none at

Beatty v. Trustees.

all, he does thus become a guarantor to the estate, it is obvious that he thereby releases the creditors and legatees or distributees from any further anxiety on the subject of the collectibility of the securities and the necessity of any further attention to the matter. They may properly regard the securities as already collected. Especially is this so where, as in the case in hand, the account has stood for many years before the executor takes any step to correct it or release himself from liability thereunder. But it is quite evident that the executors in this case voluntarily charged themselves with the securities. All those with which they charged themselves were believed to be good. Easton says they had but two classes of securities—those which they considered good and those which they considered uncollectible—and that there were none between those grades. They did not charge themselves without discrimination, but sought and obtained allowance in the account for such securities as they believed to be doubtful or uncollectible, asking and obtaining allowance not only for the amounts of the notes which, in the inventory, were put down as doubtful, but also for eight others which were in the inventory but not marked doubtful, and which had proved to be uncollectible. But if the application for relief could be entertained, on the ground that the executors erred in judgment in unnecessarily incurring liability, the circumstances of the case would forbid and prevent its success. The will directed that the legacies of the adult legatees, except the trustees, should be paid in the securities which the executors received from the testator. There was no good reason for not making such payments within the year succeeding the admission of the will to probate. The true value of all the securities could have been ascertained without difficulty within that period. Although some of them greatly depreciated after that time, it was not until the great depression in the market value of real estate, and that did not begin until the fall of the year 1873, three years after the filing of the inventory. There is great reason to believe that the Ingersoll mortgage (for \$4,000) was good, and could have been collected in 1871, but it was not until 1874 that steps were taken to collect it, and then the property had depreciated in market

Beatty v. Trustees.

value very much. When it was put up for sale under the foreclosure proceedings instituted by the executors, a bid of about \$1,100 was made by another person, but the executors declined to let it go at that price, and bought it in. It was subject to a prior mortgage for over \$3,700. After the purchase, and before the sheriff's deed was delivered, the barn on the premises was burned. The executors built a new one. They sold the property in 1878, for \$600. On this transaction of the purchase of the farm, taking into the account the moneys subsequently expended upon the property by the executors in building the barn and for interest on the prior mortgage, there was a loss of about \$3,300 in addition to the loss of the claim itself; that is, the estate thus lost altogether, including interest on the mortgage held by the estate, about \$8,500, while the executors themselves admit that the mortgage was worth \$2,000 in November, 1871, and there is great reason to believe that it was then entirely collectible. The interest was paid April 1st, 1873, and had been paid up to that time. The amount of the Hughes mortgage was, it would seem, also lost through delay. The property was sold under foreclosure of the first mortgages in 1874, and then brought only \$3,000, or thereabouts, the amount of the decree upon those mortgages. But in 1871 and 1872 it probably would have brought more. Mr. Stanaback swears that it was worth more in those years than it was in 1874, and besides he says he thinks that there was an accumulation of interest at the latter date on the mortgages prior to that held by the Cory estate. He also says he thinks that in 1871 or 1872 it was worth about \$40 an acre. There were, he says, about ninety-three acres in it, or a little over. So that it was worth in those years about \$3,700.

And here reference may be made to the Snyder claim, which was lost after the filing of the account. In 1873 the executors held two notes for \$1,000 each, given by Jacob Couse to the testator. On one of them Peter Dennis was surety, and on the other John Snyder. On the 1st of April, 1873, \$1,070 principal and interest were paid to Easton on account of those claims. On receipt of that money he delivered up the former note on which the payment was made, and endorsed a payment

Beatty v. Trustees.

of \$1,000 on the other. Suit at law was subsequently brought by the executors on the latter note, which resulted in defeat. It is almost too obvious for remark that no allowance can be had in respect to that claim, lost, as it was, by a blunder of one of the executors. At the time of the filing of the account the claim was good, for aught that appears. The executors are entitled to no allowance in respect to any of these claims—the Ingersoll, Hughes and Snyder claims. According to their own statement in their bill, as to what the actual condition of the estate in their hands was in November, 1871, the date of filing the account, there was, allowing their estimate of \$2000 for the expenses of closing up the settlement of the estate, in addition to commissions to the amount of \$2,242.83, a deficiency of only \$1,752.07. But this result is due to their claim of allowance of \$4,886.84 for doubtful obligations, of which amount \$2,000 are claimed for the Ingersoll mortgage, and \$507.20 for the Hughes mortgage. If these be not allowed, the account will show a surplus of \$755.13, allowing \$2,000 for expenses of settling the estate over and above commissions, or \$2,755.13 if that sum be not allowed. To this is to be added the sum of \$3,000 with the interest thereon due to the estate from Frank C. Easton, for the charge upon property bequeathed to him. In the account, in the executors' bill of complaint, allowance is made for all mistakes in the amount of principal and interest due on securities in making up the inventory (and the difference on that head between the account in the bill and the account passed, is by no means great), and for the full amount of a mortgage of Alfred Roof, put down in the inventory as good, and carried (as part of the inventory) into the account passed in the orphans court. That mortgage was in suit at the testator's death, and from it nothing over and above the expenses of litigation was, in fact, realized to the estate. The account of November, 1871, represented the amount of the estate then in the hands of the executors, as they then understood it. It shows a balance of over \$6,000 after paying all debts and legacies. There was a mistake of \$1,000 in it in favor of the executors, a credit on account of a supposed error in the amount of the

Beatty v. Trustees.

principal of the Carr mortgage. The account in the bill shows, as before stated, a deficiency of \$1,752.07, but it allows \$4,886.84 for "doubtful obligations," and \$2,000 (in addition to commissions) for expenses of closing up the settlement of the estate; altogether, \$6,886.84. If those "doubtful obligations" and the \$2,000 for estimated future expenses be not allowed, the balance against the executors would be \$656.91 more than that shown by the account passed. Of those so-called doubtful obligations, the amount of the Roof mortgage, \$2,343.36, alone should be allowed. Although about \$780 were collected on that mortgage, the amount appears to have been spent in counsel fees and disbursements in the suit upon and in reference to it. The credit for errors (in addition to those allowed in the account in the orphans court) in the computation of interest on some of the items in the inventory should also be allowed, and, on the other hand, the credit for errors in the inventory as to the Carr mortgage should be struck out. The amount of the Rogers debt, in the account, should be increased from \$418.58 to \$522.59, and \$13.09 should be allowed for a debt of Rogers and Kays; \$6.50 for a debt of Samuel Ellet, and \$26.84 for a debt of John L. Riker.

There should be an allowance also for the reasonable expenses in this court of the suit instituted by the trustees against the executors. But there should be no allowance for any costs or expenses of that suit in the court of last resort. The decree of this court would have protected the executors. It was not necessary for them to take an appeal. There is some evidence that the appeal was due to a disposition on the part of one of the executors at least, to litigate in the hope of defeating the trustees. Beatty, who was averse to the litigation, testifies that Job Cory said "he never meant to pay that legacy, if he could help it," and that "he never expected to pay it." But, however that may be, the appeal was not necessary to the protection of the executors, and therefore the estate should not pay the expense of it. The costs of endeavors to collect claims (except as to the Roof mortgage) after the account in the orphans court was passed, will not be allowed. That account must stand, except so far as it is

Beatty v. Trustees.

varied by the correction of the mistakes before mentioned. The executors should be required to pay interest for the balances in their hands respectively. They ought to have settled the estate within the year following the probate of the will. The settlement would have been attended with but little trouble. The great body of the legacies was to be paid by transfer of securities, and the debts were but few. If there have been depreciation and loss, they are due to the failure of the executors to their duty in the settlement of the estate.

Their bill asks for construction of the will and for instructions as to their duty in certain respects. Those matters will be now considered. And first as to the question whether, under the sixth clause, Easton is chargeable with interest on the \$3,000 thereby made payable, and, if so, from what time, and when it is due. The will expressly provides that he shall pay interest. He was to pay the \$3,000 in five years after taking possession. He took possession on the death of the widow, August 6th, 1876. The interest ran from that day, and both principal and interest were payable at the end of five years from that time. He is chargeable with lawful interest upon the interest (with annual rests) from August 6th, 1881.

In the sixteenth clause of the will, a legacy is given to persons whom the testator designates as George, Francis and "Sharlotty," the children of his deceased daughter, Eliza Roe. There can be no doubt, from the evidence, that by "Sharlotty" he meant Mattie C. Roe, the only daughter of Eliza. He was in the habit of calling her by the name of "Charlotty."

Under that clause, her share, in case she should die before attaining to majority, will go to her surviving brothers. The language is—

"If any one of them should die before that time [majority] then his or her share to go [to] the living."

By the seventeenth clause, the testator provided that in case of the death of the legatee therein named, Catharine Roe, before attaining to her majority, or in case she should die without issue,

Beatty v. Trustees.

then the legacy given to her is to "revert back to" his "other lawful heirs."

The question propounded is, What is meant by the provision that it shall revert back to his lawful heirs? By the term "revert" he meant "go to," and by "lawful heirs" he meant his children, or, in case of their death, those who should legally represent them.

In the nineteenth clause a legacy is given to his three grandsons, Francis, William and "Yeany," sons of his son Job. By "Yeany" he meant Job's son Eugene, whom he habitually called by the nickname of "Yeany."

The twenty-first clause is as follows :

"It is my will, and I do order, that all the above stipulated legacies and bequests to be paid by my executors, or the survivors of them, to the above-named legatees in notes or bonds and mortgages transferred to them with the respective value at the time by my executors or the survivors of them, excepting those that are not of age as stated above; and if there shall be an overplus after paying the stipulated legacies and debts, then I order that what remains to be paid or distributed to my lawful heirs."

This is a provision for payment of those legacies to the adult legatees in notes or bonds and mortgages belonging to the testator at the time of his death. He directs that the selection be made by his executors, and that the value at which the securities shall be taken by the legatees shall be the amount due upon them at the time of transfer. The transfer has, in fact, been made to all of the adult legatees whom the executors have not paid in cash. By the concluding provision of the section the testator meant to give any surplus which should remain (there is no residuary clause in the will or codicil) after payment of debts and legacies to his children, or in case of their death, to those who should legally represent them.

The legacies to those adult legatees are demonstrative legacies, for they are to be paid out of certain designated securities. But the testator did not intend that they should, by reason of that fact, have a preference, in any way, over the other legacies. He directs that the legacy given to his three grandchildren, George, Francis and Charlotte Roe, "remain" in the hands of his execu-

Beatty v. Trustees.

tors or guardians to be appointed for the purpose of taking charge of the money, and be kept at interest for the infants until they shall have attained to their majority. He directs that the legacy to Katy Roe be "retained" in the hands of his executors and kept at interest for her until she shall attain to the age of twenty-one years. He also directs his executors to retain \$12,000 in their hands for the church legacy. He did not intend that the adult legatees, who were to be paid in securities, should have a preference over the others, but, on the contrary, while he presumed and believed that there would be quite enough to pay all in full, he, in effect, directed his executors to retain—withhold from the assets—certain sums of money for the infant legatees and the church. So far from those adult legatees being entitled to a preference over the infant legatees and the church, the infants and the church are rather entitled to priority over them. The legacies, however, are all to be considered as general legacies, and therefore liable to abate proportionately. Hence, in case of a deficiency of assets, the adult legatees who have been paid in full, would be bound to contribute to the payment of the legacies to the infants and the church.

This question of contribution is of no importance. The executors are chargeable with all the unpaid legacies in full, with interest thereon.

The question whether the devisees can also be compelled to contribute is asked. The legacies are not charged on the land. There is, therefore, no liability on the part of the devisees to contribute to the payment of the legacies.

By far the greater part of the litigation has been in their own behalf to relieve themselves from the liability incurred by the filing of the account in the orphans court. Had they been successful in that matter, it would have been just that they pay costs. The questions of construction which are raised are, some of them, unimportant, and all of them are raised at so late a day and under circumstances so unfavorable to the executors, that they must be held not to be entitled to costs as to them, but, on the contrary, they should pay the costs of the suit, notwithstanding the fact that they have asked for a construction of the will as part of the relief.

Booraem v. North Hudson County Railway Co.

CORNELIA BOORAEM

v.

THE NORTH HUDSON COUNTY RAILWAY COMPANY.

Land dedicated for a highway does not, *ipso facto*, become a highway, and will not become so until the proper municipal authority has accepted it.

On motion for injunction, heard on bill and affidavits and answer and affidavits.

Mr. J. Henry Stone, for motion.

Mr. John C. Besson, *contra*.

VAN FLEET, V. C.

The defendants are engaged in constructing an elevated railroad from the Hoboken ferries, on the Hudson river, to Jersey City Heights. The complainant seeks to have them enjoined from constructing their road over and across certain lands conveyed by her for the use of the defendants. On the 21st of August, 1881, the complainant, for the consideration of \$25,000, conveyed two tracts of land to John H. Bonn. Mr. Bonn was then, and is still, the president of the defendants, and it is an admitted fact that he took title to the lands in question for the defendants, and that they are the real owners of them. The deed made by the complainant contains a clause, immediately following the description of the lands conveyed, which reads as follows:

"Together with all the right, title and interest of the said party of the first part to the lands covered by Ogden and Palisade avenues, in front of the lands above described, subject to the easements of said avenues respectively; it being understood that Ogden avenue is extended, for the same width, across said premises, and dedicated as a public highway."

Ogden avenue runs from north to south, and its southerly

Booraem v. North Hudson County Railway Co.

terminus, at the date of the conveyance, was at the northerly line of the lands conveyed by complainant to Mr. Bonn. It has not been opened across the lands so conveyed, nor accepted or recognized by the municipality of Jersey City, in any manner, as a public highway. The defendants commenced the construction of their works, on the lands acquired from complainant, in February, 1884. The bill in this case was not filed until August, 1884. The defendants intended to construct their road immediately above that part of the land which, by the deed from complainant, is dedicated for the extension of Ogden avenue, at an elevation of between six and eight feet above the natural surface of the earth. The complainant owns lands adjacent to those which she conveyed to Mr. Bonn, and did, at the date of her conveyance to him, which she believes have a large prospective value, but which can only be made accessible and desirable, as building sites, by the extension of Ogden avenue. They are now in their natural condition, being wholly unimproved, except enclosing them by a high board fence should be regarded as an improvement. The special grievance of which the complainant complains is, that if the defendants shall be permitted to construct their road at so slight an elevation above the surface of the earth, Ogden avenue will, at that point, be rendered useless as a public highway, and the purpose she had in view, in dedicating land for its extension, be entirely defeated, as the space between the defendant's structure and the earth beneath will be wholly insufficient for a highway. To prevent this result, the complainant asks that the defendants may be enjoined from constructing their road over the lands so dedicated, except they do so either on the surface, or at a sufficient elevation not to obstruct the safe and convenient use of the avenue as a public highway.

The defendants are in the rightful possession of the lands in controversy as its owners. It is manifest, therefore, that unless the use which they intend to make of it will deprive the complainant of some clear present right, to her irreparable injury, no ground for the exercise of the prohibitory power of the court is presented. A suitor, to entitle himself to the exercise of one of

Booraem v. North Hudson County Railway Co.

the strongest and most delicate powers of the court, is invariably required to exhibit a case of urgent necessity growing out of a violation of a clear present right.

The land in question was unquestionably dedicated for the extension of Ogden avenue as a public highway. The language employed to manifest the intention of the parties in that regard is apt and unequivocal. But the rights thus created are public rights. When the use or purpose for which a dedication is made, is declared, the land cannot be used by the public for any other purpose. A private way cannot be created by dedication. *Methodist Church v. Hoboken*, 4 Vr. 13. The complainant, by her deed, completely stripped herself of all right to and interest in the land conveyed, and she stands now as bare of any private or individual right in the land as though she had never been invested with the title to it. The dedication created a public right, but no private or individual right. A dedication of land for the purpose of a highway does not, *ipso facto*, create a highway. "An individual," to state a well-established principle in the words of Chief-Justice Green, "cannot, at his pleasure, create public highways for his own benefit, upon his own land, and impose upon the public the burden of maintaining them." *Holmes v. Jersey City*, 1 Beas. 299. The public are no more compelled to accept land dedicated for a highway, than land-owners are obliged to dedicate their lands for that purpose. *Fisher v. Prowse*, 2 B. & S. 770; 2 *Smith's Lead. Cas.* (5th Am. ed.) 163. In many instances, perhaps in most, dedications are made long in advance of the time when the land will be needed for the purpose for which it is dedicated. Villages and cities are often projected on paper, and streets and parks laid out, where there is no population to use the streets or walk in the parks, and where none will exist for years after the land is set apart for public use. The public square, which the city of Hoboken recovered from a church corporation in 1868, was dedicated in 1804, and was used as a cow pasture as late as 1834. *Methodist Church v. Hoboken*, 4 Vr. 13. In order to complete a dedication of land for a public use there must be an acceptance by the public. Land dedicated for a public highway does not become a high-

Booraem v. North Hudson County Railway Co.

way simply by force of the dedication, nor until the proper municipal authority has accepted the dedication, or in some way ratified it. *Pope v. Union*, 3 C. E. Gr. 282; *Attorney-General v. Morris and Essex R. R. Co.*, 4 C. E. Gr. 386; 2 *Smith's Lead. Cas.* (5th Am. ed.) 162; *Washb. on Eas.* 139. In *Hoboken Land and Improvement Co. v. Hoboken*, 7 Vr. 540, it was said: "Acceptance by a formal adoption by the public authorities, or by public user, is necessary to impose on the public the duty to amend or repair, but it is not essential to the consummation of the dedication, so as to cut off the owner from the power of retraction, or to subject the dedicated lands to the public use, whenever, in the estimation of the local authorities, the wants or convenience of the public require them for the purpose for which they were dedicated." But until, in the judgment of the local authorities, they are required by the public, the person dedicating them, or their owner, may make any use of them he sees fit.

It is clear, then, in view of the legal rules above stated, that the land dedicated for the extension of Ogden avenue is not now subject to the easement of a public highway, and cannot become subject to such easement until the proper municipal authority decides that it is advisable to accept the dedication. At present, the construction of the defendant's road over the land in question will not, and cannot, injure or obstruct a public highway, for none exists there. Whether the dedication will ever be accepted or not, or a public highway will ever exist at the point in question or not, is an inquiry wholly immaterial at this time. The complainant, in order to entitle herself to the writ she asks, must show a clear present right; a doubtful or problematical right, possible to arise sometime in the future, affords her no standing whatever. If a public highway never exists at the point in question, she will never be entitled to have her use of it protected. If an injunction were to issue now, it would go to protect a right which does not exist, and which may never exist.

The injunction asked must be denied, and the complainant's bill will be dismissed, with costs.

Parker v. Hayes.

BENJAMIN F. PARKER

v.

ADMINISTRATOR OF DAVID A. HAYES, deceased.

1. A false representation, to be the proper subject of judicial action or cognizance, must be the cause of legal wrong or injury, and such cannot be the effect of a false representation made to a person who knows it to be false.

2. If an infant, being entitled to a sum of money on attaining twenty-one years of age, induces his trustee to pay it to him in advance of that time by fraudulently representing himself to be older than he is in fact, he will, in equity, be bound by the payment, but only to the extent of the payment actually made. If the trustee induces the infant to release the whole, on paying only a part of what is due him, the release will only be held good to the extent of the payment made.

On final hearing on bill and answer and proofs taken before a master.

Mr. Stephen B. Ransom, for complainant.

Mr. Cortlandt Parker, for defendant.

VAN FLEET, V. C.

This suit was commenced December 21st, 1868. It was brought by the complainant against David A. Hayes to compel him to render an account as guardian of the complainant, and to pay the complainant such sum as should be found to be due. As incidental to the relief just mentioned, the complainant also asked that a release which he had executed to Mr. Hayes should be declared to be of no effect. Issue was joined in May, 1869, and the complainant completed the taking of his proofs in November, 1870. Mr. Hayes, in 1871, under the act of 1862, took the evidence of certain witnesses residing in Illinois, but their evidence was suppressed in 1872 in consequence of the oppressive manner in which it had been taken, the examination of the wit-

NOTE.—See *Kerr on Fraud and Mistake* 148; 3 *Wait on Actions* 443; *Tyler on Infancy* 53, 176; *Wood v. Vance*, 1 *Nott & McCord* 197; *Hewitt v. Warren*, 10 *Hun* 560.—REP.

Parker v. Hayes.

nesses having been stretched along, by adjournments, from April 21st, 1871, to the 20th day of June following. *Parker v. Hayes*, 8 C. E. Gr. 186. Mr. Hayes was not examined, and after the evidence of his foreign witnesses was suppressed, no further step was taken in the case, by either side, until after his death. He died in November, 1875, but the suit was not revived against his representative until March, 1880. Subsequently, in 1883, the evidence of certain foreign witnesses, on the part of the defendant, was taken under commission, and the cause is now brought to hearing on the evidence taken in 1869 and 1870 and in 1883.

The complainant's father, Isaac S. Parker, died in 1857, leaving a will, by which he gave to the complainant a legacy of \$7,400, payable on his attaining twenty-one years of age, and appointed his sister, the complainant's aunt, guardian of the complainant, and directed her to invest the legacy securely, at interest, on bond and mortgage of real estate, and apply the interest to the complainant's maintenance and education. The testamentary guardian qualified, but was afterwards removed, and on the 15th of April, 1862, Mr. Hayes was appointed in her place. Between the date of his appointment and the 1st day of May, 1863, Mr. Hayes received for his ward cash and securities aggregating over \$5,400. Over \$4,000 of this sum consisted of interest-bearing securities against debtors resident in the state of Illinois. Prior to the issue of letters of guardianship to him, Mr. Hayes constituted one Silas G. Randall, of the state of Illinois, his agent, and took from him a bond in the sum of \$10,000, bearing date March 18th, 1862, with one Jesse Blinn as surety, conditioned that Randall should faithfully perform all his duties as agent, properly fulfill and discharge all trusts confided to him by Hayes, and justly and promptly account for and pay and deliver all moneys and property coming to his hands or control belonging to Hayes as guardian. Mr. Hayes, by his answer, states that, subsequent to the execution of this bond, Randall obtained certain of the assets of his ward's estate and also some money, but he gives neither the value of the assets nor the amount of the money. He also says that Blinn, the surety of Randall, and who was connected in business with Randall.

Parker v. Hayes.

received, during the years 1862 and 1863, from the assets of his ward's estate, about \$4,200, and made certain payments therefrom, but that after crediting such payments there was a considerable balance still due, which Blinn was unable to pay. For this balance Mr. Hayes brought suit against Blinn in one of the courts of Illinois, in the latter part of 1865 or the early part of 1866, which was still pending, untried, in May, 1867. Mr. Hayes, by his answer, also says that the complainant, with his mother, called upon him in the city of Newark in February, 1867, and then represented that he had, in the month of April of the preceding year, attained the age of twenty-one years, and requested a settlement. He says that in response to this request he insisted that, in view of the circumstances under which he had consented to become guardian, and what had transpired since his appointment, it would be unjust to require him to make a settlement then, but that the complainant should wait until the suit against Blinn was concluded, or take an assignment of that suit and release him. He further says that the complainant agreed to the latter part of his proposition, that is, that he would take an assignment of the suit against Blinn and release him, on condition, however, that he (Hayes) should lend him \$500 to start in business and make no charge for his services as guardian. A time was appointed when this agreement should be carried into effect, and Mr. Hayes prepared the necessary papers, but at the time appointed for their execution the complainant did not appear. Mr. Hayes afterwards had an interview with him, when the complainant informed him that his previous statement respecting his age was incorrect, and that he would not become twenty-one until the ensuing April; that it was then arranged that the complainant should at once return to Illinois, and that when he became twenty-one the terms of the settlement as previously agreed upon should be carried out; that in pursuance of this understanding he, some time in the month of April, 1867, sent to his attorneys in Illinois a check for \$500, payable to the order of the complainant, with direction to deliver it to complainant on his giving his note for \$500 and executing a release, releasing him (Hayes) from all liability as his guardian,

Parker v. Hayes.

and likewise directed his attorneys to put the complainant in control of the suit against Blinn, and to do whatever might be necessary to enable him to prosecute that suit for his own use and benefit, and also to execute to the complainant a discharge for any compensation he might be entitled to as guardian.

Up to this time Mr. Hayes had not accounted with the complainant, nor in any way informed him of the amount of the estate which had come to his hands as guardian, nor of the sum he would be entitled to on attaining his majority. No account was ever rendered. The answer makes no claim that a settlement was made, or that an account was rendered, and the proof on the part of the complainant is undisputed, that no account of any kind was ever rendered by Mr. Hayes to the complainant. The proofs show that, on the 3d of May, 1867, Mr. Hayes wrote to the complainant, stating that he had sent a check for \$500 to his attorneys in Illinois, for him, and also informing him that he had just received information that Blinn's sons were desirous of making a settlement. He requested the complainant to go and get the check, and also to see if he could not come to an agreement with Blinn's sons. The arrangement which this letter indicates as existing between the complainant and Mr. Hayes, is quite inconsistent with that set up in the answer. The letter does not say that the complainant, on receiving a loan of \$500, and an assignment of the suit against Blinn, was to release Mr. Hayes, but, on the contrary, that on receiving an advance of \$500 from Mr. Hayes, he should wait for a final settlement of the guardianship matter until Mr. Hayes could effect a settlement with Blinn. These are its words:

"I promised to advance you \$500 when you became of age, for which you agreed to give me your note, and wait until I could get a settlement with Blinn to close up our matters."

Between the date of the letter just mentioned and the 18th of May, 1867, a further demand for an accounting was made on behalf of the complainant. This is shown by a letter written by Mr. Hayes to the complainant on the date last mentioned, in which he says that he has been visited by a gentleman who

Parker v. Hayes.

called by direction of the complainant's mother, and wished him to pay the whole amount due to the complainant. The letter then proceeds :

" You well know that I undertook this guardianship at the earnest request of your mother, when she could not find any friend to assist her, and that I did it as a matter of charity for her and you. I do not wish to have any trouble with you, but I cannot think you have done this of your own accord. After all I have done for you I should have thought you would at least have written to me about it. If you will think of what I have done for you, you must say that it was not treating me right. Write me and let me know if this is your doing, or some one else influencing you. Let me also know if you intend to take the money and come to the arrangement you promised when here. * * * * * If you are willing to make any arrangement with Blinn—Mr. Brown says the son of Blinn has made a very good offer of settlement, which he thinks you will accept—I have authorized Mr. Brown to say what I will do if you will accept the offer, and still leaving a claim for the whole amount against Randall."

At the date of these letters, the complainant resided about one hundred miles distant from the town in which Mr. Hayes's Illinois counsel resided. Mr. Blinn lived in the same town, so that the complainant in going for the \$500 was placed in a situation where it was easy to bring him in contact with Blinn.

The complainant visited Mr. Brown, the Illinois counsel of Mr. Hayes, on the 25th of May, 1867, and on being told that he could have the \$500 on giving his note for it, replied that he ought not to be required to give his note for money that belonged to him, and then said that Mr. Hayes had written to him that Blinn wanted to settle, and that he would like to see Blinn to talk the matter over with him. The complainant was accompanied by his father-in-law. They were both taken by Mr. Brown, not to Blinn, but to the office of Hosmer P. Holland, a lawyer, and the son-in-law of Blinn, and introduced to him. Mr. Brown says that they returned to his office in less than two hours, and on their return, the complainant stated that he agreed upon a settlement, and made known its terms. He says he expostulated with the complainant against such precipitate action, and told him he would not consent to a settlement until the complainant had made a personal examination of such of the

Parker v. Hayes.

lands he had agreed to take as lay near them, but the settlement, as agreed upon within the two hours, was carried out on the 28th of May, in the presence of Mr. Brown; the complainant having, in the meantime, made a personal inspection of two or three of the tracts. By the terms of the settlement, the complainant agreed, on the payment of \$500 in money and the conveyance of one hundred and twenty acres of land in Iowa, two tracts of land of forty acres each, situate in Winnebago county, Illinois, seven town lots in the town of Stirling, Illinois, and one lot in the city of Rochford, Illinois, valued together at \$3,620, making a total, with the cash payment, of \$4,120, to release both Hayes and Blinn. The necessary legal instruments to carry this agreement into effect were executed on the 28th of May, 1867. The complainant assigned to Mr. Hayes, in addition, all claim which he then held against Randall, together with his right to any moneys which might thereafter be obtained from him on his bond. This arrangement, Mr. Brown says, constituted no part of the agreement of settlement, but was the result of negotiations which took place between the complainant and himself after the terms of settlement were agreed upon, and that although he regarded the claim against Randall as of no value, he procured the complainant to assign it, because he had an impression that Mr. Hayes wanted it, thinking he might possibly, at some future time, induce Randall to pay something on it. At the time the other papers were executed, a release by Mr. Hayes to Blinn was prepared and subsequently sent to him, which he executed and delivered to Blinn, but the complainant does not seem to have had any further connection with it than to have been present when it was drawn, and he may possibly have heard it read; but it is not shown to be true, as the answer alleges, that this release was prepared and sent to Mr. Hayes for execution, by direction of the complainant, and that after execution it was returned to the complainant, and by him delivered to Blinn.

As will have been seen, the material question of the case is, Is the complainant concluded by the settlement, or is his right of action cut off by his release? The proofs show quite as strongly as, I think, such a fact can be proved in ordinary cases,

Parker v. Hayes.

that the complainant was under the disability of infancy at the time the settlement was made, and did not reach the age of twenty-one years until the spring of 1868. His mother, the physician who attended her at the complainant's birth, his maternal grandmother, his uncle and his elder brother, all swear that the complainant was born in the spring of 1847. There is no opposing evidence by the mouth of a single witness pretending to have knowledge of the fact, and the only evidence which can be regarded as standing at all in conflict with that just recited, is the averment of the answer that both the complainant and his mother, in February, 1867, fixed the date of the complainant's birth first as two years earlier, and then as one year earlier than the date fixed by these witnesses, and by the representations proved to have been made by the complainant as to his age, at the time of the settlement. The evidence, however, respecting the fact, will justify but one conclusion, and that is, that the complainant was born in the spring of 1847, and was, consequently, incapable of making a valid contract when the settlement was made.

But, it is contended, that notwithstanding the complainant's infancy at the time of the settlement, he is concluded by it, and bound by his release to the same extent that he would have been if he had been an adult, because he induced the person whose property he obtained to deal with him as a person of full capacity, by fraudulently representing himself to be of full age. The fact that he made such representation is fully established. Three of the five persons present at the execution of the papers, which were designed to give effect to the settlement, swear that, pursuant to a plan previously arranged, the person who witnessed the execution of the papers asked the complainant if he was then of age, and that he replied that he had attained twenty-one years of age the preceding April. The complainant, on the contrary, says that he did not, on that occasion, state his age to any one, while his father-in-law, who was also present, although examined on the part of the complainant, gave no testimony whatever on this point. So that, it will be perceived, the decided weight of the evidence is that such representation was made.

Parker v. Hayes.

But this evidence does not go far enough to help the defendant. Mr. Hayes was not present at the settlement, and could not, therefore, have been deceived or defrauded by any false representation made there. Besides, it is said that Mr. Hayes knew the complainant's age. The complainant's mother swears that she told Mr. Hayes, in 1865, that the complainant's birth occurred in 1847, and that she repeated this statement to him, in substance, in 1867. If this is true, he could not have been deceived by any previous misrepresentation, nor by any recital or declaration contained in the release respecting the complainant's age, but, on the contrary, knew, when the release was delivered to him, that it had been executed by a person who was legally incompetent to do such an act. A false representation made to a person who knows it to be false is not, in legal estimation, a fraud. True, it is a falsehood, and perhaps, judged according to moral standards, it is none the less sinful because spoken to a person who cannot be deluded by it, but a false representation, to be the proper subject of judicial action or cognizance, must be cause of legal wrong or injury, and no such result can follow where the representation is made to a person who knows it to be false, for in such case he cannot be deceived by it, and if he acts on it, his act will not be the result of deception, but of his own folly. But opposed to the truth of this story, stand both the oath and conduct of Mr. Hayes. He was required to answer under oath, and has done so. By his answer, he affirms that the complainant represented to him, shortly before he returned to Illinois in the spring of 1867, that he had recently examined their family record, contained in the family Bible, and found, from the date of his birth as there recorded, that he would become twenty-one years of age in April, 1867. But the two letters written by Mr. Hayes in May, 1867, already referred to, furnish, as I think, much stronger evidence. In the first he says, in substance :

"I promised to advance to you \$500 when you became of age. I have sent the money, in fulfillment of my promise, to my attorney; I want you to go and get it. You agreed to give your note for it, and to wait for the balance of what I owe you until I can get a settlement with Blinn."

Parker v. Hayes.

This language will bear but one interpretation—the \$500 had been sent because the complainant had attained full age, and had a right, therefore, to demand it; he had a right also, for the same reason, to demand any additional sum which might be due to him, but he had agreed not to do so for the present, but to wait until Mr. Hayes could effect a settlement with Blinn. Unless the letter was written as a step in a very deep and desperate plot, it must be regarded as furnishing very strong evidence that the writer was under an honest belief that the complainant had attained his majority. The second letter furnishes even stronger evidence that that was the fact. In that letter, it will be remembered, Mr. Hayes informs the complainant that he had been visited by a gentleman who claimed to represent him, and on his behalf required the payment of the whole amount due at once. The demand, viewed from Mr. Hayes's standpoint, involved the violation of the complainant's promise, and would, therefore, naturally have excited his opposition and provoked him to resist by all the means in his power. If he had entertained the slightest doubt about the complainant's right to make such a demand, in consequence of his minority, he would have made that doubt known in this letter; nay, I think it is manifest that he would have gone further and denied the complainant's right to make such a demand, especially if it had been true that he could have justified himself in that course by simply confronting the complainant with his mother's statement, made less than three months before, that he was still a minor. But he took no such ground; on the contrary, he conceded the complainant's right, so far as his age was concerned, to make the demand, and the only resistance he made against it was, that the complainant was violating his promise, and threatening to deal so unjustly with him, in view of what he had done for the complainant, that he could not believe that the complainant was acting according to his own mind, but rather in obedience to some influence inimical to both of them. It is utterly impossible to reconcile Mr. Hayes's conduct with the existence of doubt in his mind as to the complainant's age, much less can it be believed that he possessed, at the time these letters were written, certain

Parker v. Hayes.

and definite knowledge that the complainant was still a minor. If he had possessed such knowledge, his safety lay in declaring it, not in concealing it. He had no motive to conceal it. If he had possessed it, his natural impulses, quite as strongly as his safety, would have impelled him to make it known. The fact that he did not, renders it almost absolutely certain that he did not possess such knowledge. The proofs, in my judgment, show that at the time Mr. Hayes remitted the \$500, as also when he received the release, he believed that the complainant had attained his majority, and that that belief rested on representations made by the complainant himself. And it is not at all difficult to believe that the complainant had been guilty of such misrepresentation to Mr. Hayes, when it is remembered that it is proved, in such manner as almost to exclude doubt, that, when he was appealed to at the time of the settlement to state his age, he gave the same false answer then that Mr. Hayes says he had previously given to him.

But deciding the question of fraud against the complainant does not necessarily involve the denial of all relief to him. Infancy is a legal privilege. The release upon which the defence rests is, at law, without the slightest force. It is no answer at law to the fact of infancy, that the person dealing with the infant was induced to do so by the infant's fraudulent representation that he was of full age. *1 Chitty on Cont. (11th Am. ed.) 195*. The rule in equity, however, is different. In equity, in the language of Lord King, infants have no privilege to cheat men. If an infant obtains property by fraudulently representing himself to be of full age, equity will compel him either to pay for the property or to surrender it. *Evroy v. Nicholas, 2 Eq. Cas. Abr. 488*; *Clarke v. Copley, 2 Cox 173*. So, if he engages in business and incurs debts by fraudulently representing that he is of full age, and is afterwards adjudged a bankrupt, the debts so incurred may be proved against his estate. *Ex parte Unity Bank, 3 De G. & J. 63*. And so if he is entitled to a sum of money on attaining twenty-one years of age, and he induces his trustee to pay it to him in advance of that time by falsely representing himself to be older than he is, he will, in equity, be

Parker v. Hayes.

bound by the payment (*Cory v. Gertken*, 2 Madd. (40) 362), but only to the extent that he actually receives payment. If his trustee, on paying him only a part of what is due, induces or procures him to release the whole, the release, being void at law, will only be held good, in equity, to the extent of the payment actually made. *Overton v. Banister*, 3 Hare 503. The justice of this rule is manifest. At law, an infant is incompetent to make a valid contract except in certain exceptional instances. He may be old enough and cunning enough to contrive and carry out a fraud, yet, if he does, the law is powerless to give redress. The law cannot prevent him from using the shield which was intended simply as a protection, as a cover for his own cheating. Equity, to correct this wrong, steps in and declares that when an infant induces another to deal with him by fraudulently representing himself to be of full age, that, to the extent that the contract is just and fair to him, and also to the extent to which it is necessary to hold him to it to prevent him from reaping the fruits of his fraud, he shall be compelled to abide by it.

Tried by this rule, it is clear that the release does not bar this action. The complainant is entitled to an account. No account has ever been rendered to him. And this, in my view, is one of the most decisive facts of the case. Moreover, it is impossible to scan the proofs, even cursorily, without seeing that, when it became evident that somebody must suffer loss in consequence of the guardian's transactions with Randall and Blinn, the guardian was eager to put the complainant in a position where he would be compelled to bear it. He confesses by his answer that a bargain was actually made, and that he drew the necessary papers to carry it out, whereby he was to be released from all liability to the complainant on lending him \$500 and assigning to him a suit against a worthless or insolvent debtor. The complainant had a right to a full and specific account from his guardian; he had a right to know just what estate his guardian had received, what had been done with it, and what sum still remained due to him. It was the duty of his guardian to inform him fully and accurately as to his rights, even as to those which

Parker v. Hayes.

existed against the guardian himself. The answer does not pretend that the guardian performed these duties, or either of them, but it would seem that he either sent or allowed the complainant to return to Illinois utterly ignorant of the condition of his estate, and shortly afterwards, with full knowledge that the complainant, for want of information, was wholly incompetent to deal with such an affair, either safely or intelligently, requested him to go to Blinn and see if he could not effect a settlement, stating that a settlement might be so made with Blinn as still to leave a claim for the whole amount due against Randall. The guardian must have known that this statement, while without the least foundation in truth, was likely to exert a powerful influence on the mind of the complainant, for it cannot be believed that the guardian, who was a lawyer of experience, did not know that the law would not allow a creditor to collect the same debt twice. When the complainant made the settlement with Blinn, he was ignorant of the amount of Blinn's indebtedness to his guardian, and it appears that even Mr. Brown, the guardian's counsel, did not, at that time, know the amount of Blinn's liability. In view of these facts, it is entirely clear that if the complainant had been otherwise competent, he was incapable of negotiating a settlement so as to take proper care of his own interests, for the want of information which his guardian could alone furnish him. Besides, it appears that the sum paid on behalf of Blinn, in the settlement, did not cover the full amount of his liability. Mr. Holland says that it was a little short of the whole amount due, but that he is unable to state either the whole amount due or the actual amount of the deficiency. These facts render it perfectly plain that the complainant's guardian lured him into making a settlement by which he got neither what he was entitled to nor all he was entitled to. No principle of justice requires the court to compel a minor to abide by a contract obtained by such means.

An account will be decreed. The complainant, while still a minor, conveyed one of the tracts conveyed to him by Holland, to a person whose name is not given in the pleadings, and the residue to his mother. She, since then, has conveyed another

Parker v. Hayes.

tract to a third person. She is not a party to this suit. The court, therefore, has no control over the title to these lands, and the complainant must, in the accounting, be charged with their fair value. But I am not satisfied that the sums the complainant agreed to pay for them represented their fair value at the time the settlement was made. Mr. Holland says that he had owned the lands about a year prior to their conveyance to the complainant, and that he conveyed them at an advance of about twenty-five per cent. over the prices he had paid. The only witness, except Mr. Holland, who speaks on the question of value, on the part of the defendant, names, as the minimum price of two of the tracts, sums considerably less than those at which the lands were conveyed. When it is remembered that the complainant was enticed into the settlement without any knowledge whatever respecting the value of these lands, and the influences by which he was surrounded at that time are considered, I think it is manifest that he should not be charged for the lands at the prices then agreed upon, without further evidence that they were reasonable and fair. By the terms of the gift to the complainant, his legacy was not payable until he attained twenty-one years of age, but the legacy was, in the meantime, to be invested, and the interest applied to his maintenance and education. By the account annexed to the answer, the total of the allowances claimed for each year from 1862 to 1867 exceeds the sum which the legacy could have earned as interest—those for 1862 exceed \$900, and those for 1864 exceed \$800. Circumstances may have existed which justified an allowance in excess of the interest, but until such is shown to be the fact, the annual allowance to be made for maintenance and education must be limited to the interest of the legacy.

A decree in conformity to the views above expressed will be advised.

Kelly v. Dunning.

JAMES KELLY

v.

PHEBE M. DUNNING.

1. A natural watercourse may be created by the flow of surface water.
 2. A land-owner has no right to cause the natural discharge of surface water, from his land on that of his neighbor, to be changed, to the injury of the latter, by conducting it by new channels, in unusual quantities, to the land of his neighbor.
-

On application for injunction heard on bill and affidavits, and answer and affidavits.

Mr. Charles S. Lighthipe, for complainant.

Mr. James W. Field, for defendant.

VAN FLEET, V. C.

This is an application for an injunction, the prayer of the complainant being that the defendant may be enjoined from permitting what is called in the bill a ditch or watercourse to remain filled up and obstructed, and from further filling up and obstructing the same. The draughtsman of the bill seems to have been in doubt whether the waterway which the complainant desires to have opened is a natural or artificial stream, and for that reason called it a ditch or watercourse; but when he comes to describe it, his description leaves no doubt as to its legal character. In describing it, he says that for a great many years prior to 1867, there had passed over and across his land a certain ditch or watercourse, having its source on lands of one Richard Harrison, at a point about one hundred feet east of his land, and from that point running in a westerly direction over his land and land intervening between his and that of the defendant, and then across the defendant's land to Parrowbrook; and that water had, from time immemorial, been wont to flow

Kelly v. Dunning.

and run, and of right should flow and run through said ditch or watercourse, over and across, and from and off his land, to and across the intervening land into Parrow brook. .

If this description is true, there can be no doubt that the stream is a natural watercourse, though it has no perennial source, and carries nothing but surface-water. That would seem to be the real character of the stream, for although the bill says it rises, or has its source on lands of Richard Harrison, it does not allege that a spring or any perennial source of supply exists there; and, in addition, it is important to notice that when it comes to describe the complainant's injuries, it does not charge that the defendant has thrown the water of the stream back on the complainant's land, but merely avers that the defendant, by filling up the channel of the stream, has cut off the outlet by which the water, which collects on his land in wet seasons and after heavy rains, has always heretofore been carried off and emptied into Parrow brook. That is the *gravamen* of the complaint. The complainant, in stating his injuries, says that the surface of his land is such as to collect, in wet seasons and after heavy rains, a large quantity of water which has always heretofore been carried to Parrow brook by the ditch or watercourse, but now, in consequence of the obstructions placed therein by the defendant, the water, at such times, remains on his land until absorbed by the earth or evaporated by the sun.

Now, although it has been decided that no right of any kind can be claimed in the mere flow of surface-water, and that damage resulting from its retention, diversion, repulsion or altered transmission, is not the proper subject of judicial redress (*Bowlsby v. Speer*, 2 Vr. 351; *Town of Union* ads. *Durkes*, 9 Vr. 21), unless it appears that the damage was caused by collecting the water of a large district of country, by artificial means, into one body, and then pouring it in its accumulated volume and force at a single point (*Field v. West Orange*, 9 Stew. Eq. 118; *S. C. on appeal*, 10 Stew. Eq. 600), yet it is also well established that collections of surface-water may, under some circumstances, constitute a natural watercourse and confer upon those through whose lands it flows the same rights they would have in streams fed by a

Kelly v. Dunning.

perennial source. The court of errors and appeals, in *Earl v. De Hart*, 1 *Beas.* 280, adopted Chancellor Williamson's definition of a natural watercourse. The chancellor, in that case, said: "If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse." The chancellor further said: "Whether it is entitled to be called an ancient watercourse, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams which, if dammed off, would inundate a large region of country, are dry for a great portion of the year." This statement shows the legal right claimed by the complainant and also the nature of his injury.

The defendant denies the very foundation of the complainant's case. She denies that a natural watercourse exists on the land of the complainant, or on the lands intervening between the complainant's land and hers, but says that the waterway, which the complainant calls a ditch or watercourse, is a subterranean drain constructed by the complainant and others since 1867, into which they gather the surface-water falling on their lands and beyond, and then pour the whole body thus accumulated on her land at a single point. The truth of this statement is verified by the oaths of two persons who swear that they have been familiar with the lands of the complainant and defendant for the last twenty years. If the defendant's description of the waterway in question is true, it is manifest the complainant has no case. He is the wrong-doer, and not the defendant. A landowner has no right, by means of artificial trenches or otherwise, to cause the natural discharge of surface-water from his land on that of his neighbor to be changed, to the injury of the land of the latter, by conducting it by new channels, in unusual quanti-

Shields v. Hunt.

ties, to the land of his neighbor. *Field v. West Orange, 9 Stew. Eq. 118.*

A question somewhat discussed on the argument, namely, whether the defendant's act in filling up the waterway, had not deprived the complainant of an easement which he had acquired in the land of the defendant by adverse user, is not in the case. The bill is not founded on a grant but on a right conferred by nature.

In the present condition of the case, it is clear that the complainant is not entitled to an injunction.

FANNY SHIELDS

v.

HOLLOWAY W. HUNT, executor of the last will and testament of Thomas Shields, deceased.

A widow who has dower by the judgment of a court which cannot award her damages or compensation for mesne profits, may maintain a suit in equity for their recovery.

On final hearing, on bill and answer and proofs taken in open court.*

Mr. William B. Guild, Jr., for complainant.

Mr. Henry C. Pitney, for defendant.

VAN FLEET, V. C.

This is a bill for an account. The complainant bases her right to the decree she asks on the ground that she is a dowress, and, as such, is entitled to a share of certain rents which the defendant has received as the representative of her husband. The following are the material facts: The complainant is the widow

Shields v. Hunt.

of Thomas Shields, who died on the 28th of September, 1880, leaving a will. The complainant, with others, interposed a *caveat* against the probate of the will, but, after a hearing, it was admitted to probate on the 24th of January, 1881. The will made provision for the complainant in lieu or bar of her dower, which she refused to accept by dissent filed March 29th, 1881. The testator died seized of over five hundred acres of land, situate in two different counties. The complainant remained in possession of the testator's homestead, consisting of a farm of one hundred and thirty acres, with the mansion-house, from the time of his death until her dower was set off. She paid no rent, but took the crops which she put in as well as the other products which matured during her occupancy. The land in which she was entitled to dower being situate in two different counties, the complainant, on the 3d of May, 1881, instituted proceedings in the prerogative court, for the assignment of her dower, and a final decree was made therein on the 8th of August, 1881. The testator, in his lifetime, executed three mining leases, whereby he granted to the lessees the right to mine and remove ore from certain of his lands, they covenanting to pay a fixed price per ton for all ore removed. Two of the leases provided that the lessees should pay for a certain number of tons annually, at the price agreed upon, whether they mined and removed that quantity of ore or not. Two of the leases embraced parts of the homestead farm, and the third a part of a farm called the Brown farm. The leases were still in force when dower was assigned, and one-third of the rents or royalties accruing under them, together with a part of the homestead farm, was assigned to the complainant for her dower. The defendant was authorized, by the will of the testator, to receive the rents or royalties accruing under the mining leases, and also to demise the other lands of the testator, and to receive the rents. He admits that between the death of the testator and the date when dower was assigned, he received, under one of the mining leases, over \$2,500. The object of this suit is to recover one-third of the rents and profits of all the lands of which the testator died seized, from the date of his death up to the date of the assignment of dower.

Shields v. Hunt.

The principal ground on which the complainant's right to the relief she asks is resisted, is that, by the course she adopted to have her dower admeasured, she must be understood, as a matter of law, to have waived her right to what she now claims. The argument in support of this contention is this: The complainant had a choice of remedies; she was at liberty to sue at law, or to proceed in equity, in either of which methods she would, in addition to her dower, have been entitled to recover a share of the rents accruing subsequent to the death of her husband; or she was at liberty to apply to the prerogative court for a simple admeasurement of her dower, without damages or compensation for mesne profits. Having voluntarily adopted the latter course, and sought the aid of a tribunal which she knew was incompetent to give her anything but land, she must be understood as having abandoned whatever else she was entitled to. This view, I think it is entirely clear, has no support either in the language or the purpose of the statute relative to dower. The statute contains no words indicating, even remotely, that, if a widow adopt one remedy for the recovery of her dower rather than another, she shall, in consequence of having resorted to that particular remedy, be understood as having waived rights which she would have been entitled to had she pursued a different remedy. The statute, as I understand it, endows her not only of one full, equal third part of all her husband's lands from the time the same shall be admeasured or set off to her, but when he dies seized she is entitled to the whole value of her dower from the time of her husband's death. The pertinent words of the statute, to the case in hand, are: That if the widow's dower be not assigned to her within forty days after her husband's death, she may sue for and recover the same with damages; that is to say, the value of the whole dower belonging to her from the time of her husband's death, if he shall die seized, unto the day that she shall recover seizin of her dower by the judgment of the court. *Rev. p. 321.*

Until her dower is assigned, the rights of a widow in the lands of her husband are in a very imperfect state. She cannot enter upon them against the consent of the heir, nor maintain

Shields v. Hunt.

ejectment for them; nor can her interest in them be seized on execution, nor transferred at law except by release to the terre tenant. *2 Scrib. on Dower 37, 40.* After dower has been assigned, however, the widow's seizin relates back to the time of the death of her husband, and the antecedent seizin of the heir, which took effect on the death of the husband, is considered as never having had an existence, and she is, in the contemplation of law, the immediate successor in title of her husband. *2 Scrib. on Dower 721.* And it is by force of this rule that by the assignment of dower she becomes the immediate successor in title to her husband, that a widow is permitted to maintain, even against the heir, an action to recover damages for injuries inflicted upon the land assigned subsequent to the death of her husband and before her dower is assigned. *Rogers v. Potter, 3 Vr. 78.* Applied with the utmost strictness, this principle would unquestionably entitle the complainant to one-third of the rents accruing under the mining leases, between the time of the testator's death and the date of the assignment of her dower. One-third of those rents was set off to her as part of her dower, and by the force of this principle her title to that share immediately succeeded that of her husband, and took effect, in legal theory, on the day he died.

But this action also has the support of precedent. Not, however, in this state, but in Maryland. There the courts of law have power, as the prerogative and orphans court have here, simply to admeasure dower, but not to award damages or to make compensation for mesne profits, and yet there it is held, that where dower is set-off by a court of law, the dowress may maintain a suit in equity to recover mesne profits, and that a court of equity, in such a case, is the only tribunal which can administer full and appropriate relief. *Selliman v. Bowen, 8 Gill & J. 50; Kiddall v. Trimble, 8 Gill 207.* To hold otherwise, the court says, would work a practical ouster of jurisdiction of the courts of law, for no one would ever seek their aid if it were known that the penalty of doing so was to lose all right to mesne profits. The design of our statute, conferring jurisdiction on the orphans court to admeasure dower, has been declared to be to furnish a

Shields v. Hunt.

more simple, economical and expeditious method of assigning dower than those previously in use, and not to deprive the widow of any of her legal rights, nor of any of her remedies. *In re Garrison*, 2 McCart. 393. It was argued in *Selliman v. Bowen*, as it has been in this case, that the widow's right to mesne profits is a mere incident of her right of dower, and so inseparable from the dower itself, that if the widow accepts the dower without the incident, she loses the incident, as the incident can have no existence as property, or as a property-right, separate from and independent of the principal thing to which it pertains. The same argument was urged in *Rogers v. Potter*. Both courts, however rejected this reasoning as unsound, and the court of appeals of Maryland held, as I think it was bound to do, that inasmuch as it is the clear purpose of the law to give a widow whose husband dies seized, a share of the profits of his land accruing between his death and the time when the dower is assigned, her right in that regard is just as much entitled to protection as her right to one-third of his land, and that, therefore, the person who, for that period, receives the rents, should be regarded as the bailiff or trustee of the widow, and liable to an action by her if he refuses to account to her for his stewardship.

The complainant's right to maintain this action is, in my judgment, clear both upon principle and authority.

The complainant's right to relief is also resisted on the ground that whatever delay occurred in the assignment of her dower was the result of her own conduct, and not the fault of the defendant, or of the heirs of the testator, and she should therefore bear the consequences of it herself. It is said that she interposed a caveat against the probate of the will and thereby delayed its admission to probate for over three months; and after the will was established, she again, for more than two months, delayed deciding whether she would abide by the will or not. It is also said that until she rejected the provision made for her by the will, it was not possible for the defendant or any other person either to assign dower to her or to institute proceedings for that purpose; and that when she instituted proceedings herself, the defendant gave her all the aid in his power to facilitate them. Conceding

Shields v. Hunt.

all this to be true, still I think it is impossible to find anything in it which will afford the slightest ground, either legal or equitable, on which the complainant can be denied relief. She had a right to file a caveat, and by doing so neither impaired nor imperiled her rights as dowress. She exercised her right of election within a reasonable time after the will was established, and the moment she did so she stood invested with the rights conferred by the statute, to the same extent and in the same manner that she would have been had her husband died intestate. Her right of election was free and unlogged. In order to exercise it freely she was required to surrender nothing but what the will offered in lieu of her right of dower. Yielding that, she was entitled to all the law gave her. To entitle a dowress whose husband died seized, to mesne profits, no demand of dower is necessary. The statute, in such case, makes it the duty of the heir to assign dower within forty days after the death of the husband, without demand, and if he fails to do so, the widow is entitled to mesne profits. When the husband dies seized, a plea of *tout temps prist* is no bar to a claim for mesne profits, because the right to them, under our statute, does not at all depend upon a previous demand. *Hopper v. Hopper*, 2 Zab. 715.

The complainant is entitled to a decree for an account. In taking the account, the homestead farm, or so much of it as the complainant has had the use of, must be excluded. She had a right, by the statute, to hold the homestead free of rent until her dower was assigned, and the fact that she occupied it up until that time neither bars her right to a share of the rents of the other lands, nor diminishes the amount to which she is entitled. *McLaughlin v. McLaughlin*, 7 C. E. Gr. 505. The complainant is entitled to costs.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1885.

THEODORE RUNYON, ESQ., ORDINARY.

AARON BAKER, appellant,

v.

SAMUEL J. GALPIN, administrator, respondent.

The administrator of a married woman paid a bill presented by a physician against the estate, and her husband excepted to its allowance in the settlement of the administrator's account.—*Held*, that the physician was incompetent to testify to a promise by the decedent to pay the bill.

Appeal from decree of Somerset orphans court.

Mr. R. V. Lindabury, for appellant.

Mr. A. A. Clark, for respondent.

Baker v. Galpin.

THE ORDINARY.

This appeal is from a decree of the orphans court, allowing a claim of Dr. H. G. Wagner against the estate of Mrs. Baker, a married woman, for medical services. The claim was paid by the respondent as administrator, and he claimed credit for it in his final account. To the allowance thereof the appellant excepted. Two objections are made, one that the claim was not put in under oath within the time limited (as is said) by the order limiting creditors; the other, that it was not duly proved. As to the first objection, it is enough to say that there is no evidence, except in the decree in question, and the charge for the cost of an order to limit in the account, that there was such an order. When the time limited expired does not appear. The estate was not insolvent. The exceptant was not a creditor, but the husband of the intestate claiming the surplus as such. The claimant's affidavit was, in fact, made to the claim, but it was not until after the exceptions had been filed.

As to the other ground of exception, there was no evidence before the court of the rendering of the services. The bill was made out against the intestate's estate, but to or for whom the services were rendered does not appear from it or in any other way. The only evidence on the subject is contained in the decree itself, in which it is stated that Dr. Wagner testified that the decedent promised to pay him his bill for his attendance upon her from funds coming to her from her father's estate, and that appears, from the decree, to have been all the evidence given on the subject of the claim. The burden of establishing the claim was on the accountant. Dr. Wagner was not even a competent witness to prove what was proved—the promise of the intestate to pay out of her separate estate, which was all he testified to. The claim was wholly unsupported, and should have been disallowed. The decree will consequently, so far as the allowance of the claim and the amount of the balance in the hands of the respondent are concerned, be reversed, with costs, and the record remitted to the orphans court.

Baker v. Johnston.

EXECUTORS OF WILLIAM H. BAKER, appellants,

v.

MARY K. JOHNSTON et al., respondents.

Executors were directed to convert and invest the residuary estate, and to divide it when the testator's youngest child should have attained its majority, and also thereafter to hold testator's daughter's shares during their lifetime. They sold the real estate which constituted part of the residue.—*Held*, that they were entitled, as executors, to commissions on the proceeds of the sale, and that they would also be entitled, as trustees, to another commission thereon, for the services they might render as such in reference thereto.

Appeal from Morris orphans court.*Mr. E. D. Halsey*, for appellants.*Mr. G. T. Werts*, for respondents.

THE ORDINARY.

The question presented on this appeal is whether the executors are entitled to commissions upon the money received by them on the sale of certain real estate, part of the residue. By the will they are made trustees of the residue, to convert and invest it, and to divide it when the youngest of the children of the testator shall have attained to majority, and part of it is to be held by them in trust, after the division, for the lifetime of the testator's daughters. The orphans court refused to allow commissions on the money received for the land. This was erroneous. The executors, as such, collected the money, and must be considered as having turned it over to themselves as trustees. According to the statements of the petition of appeal, it has been duly invested for the benefit of the *cestuis que trust*.

This is one of that class of cases in which the duty of the executors as such ends at a certain point, and their duty as trustees begins there. In such cases the executors are entitled to

Terhune v. Pinkney.

lawful commissions for their services as such, and they will, as trustees, be entitled to compensation for the services they may render in that capacity. The court deals with them in the matter of compensation in such cases precisely as if the two trusts, the executorship and the trusteeship, were in different hands. *Lathrop v. Smalley*, 8 C. E. Gr. 192; *Hurlburt v. Durant*, 88 N. Y. 121; *Mitchell v. Holmes*, 1 Md. Ch. 287; *Witherspoon's Case*, 3 Rich. Eq. 13; *Aston's Case*, 5 Whart. 228. That part of the decree which fixes the amount of the commissions will be reversed, with costs to be paid out of the estate.

WILLIAM TERHUNE, appellant,

v.

WILLIAM H. PINKNEY et al., respondents.

An appeal was taken on July 9th, the complete record was filed in the surrogate's office on September 16th, and on October 15th, the first day of the term, the appeal was dismissed because the appellant had not filed here a transcript of the proceedings below. On a motion to re-instate the appeal—*Held*, (1) that notice of the motion to dismiss the appeal was not necessary; * (2) that if appellant had needed additional time for filing his transcript, he ought to have applied therefor promptly.

On appeal from decree of Sussex orphans court. Motion to re-instate appeal.

Mr. M. Rosenkrans, for the motion.

Mr. T. Kays, contra.

THE ORDINARY.

On the first day of the last term of this court, this appeal was dismissed, on the ground that the appellant had not caused the

* Since changed by rule promulgated at May Term, 1885.—REP.

Brady v. McBride.

transcript of the proceedings in the orphans court to be filed as required by the rules of this court, nor at all. The appellant moves to re-instate the appeal, on the ground of surprise and merits. The allegation that one of the proctors of the respondents, on the 12th of July last, assured the proctor of the appellant that "no advantage would be taken of the situation," that is, that the fact that the stenographer's translation of his notes of the evidence had not been filed in the surrogate's office, would be regarded as a sufficient excuse for not filing the transcript within the time fixed by the rules, is positively denied. It was clearly the duty of the proctor of the appellant to apply to the court for further time, if it was needed, to file the transcript. Moreover, the record of the evidence was filed in the surrogate's office on the 16th of September, and the first day of the next term was the 15th of October. There was, therefore, time enough after the record had been filed to get the cause ready for hearing at the last term. The proctor of the respondent moved, as before stated, on the first day of the last term. That was the first term after the taking of the appeal, which was taken on the 9th of July last. He was not bound to give notice of the motion. The motion to re-instate will be denied, but without costs.

PHILIP BRADY et al., appellants,

v.

MARY McBRIDE et al., respondents.

In February, 1876, a will was executed by a widow, who was then about eighty-two years old, and blind. In November, 1878, an inquisition of lunacy found that she was then of unsound mind, and had been so for three years preceding. Her testamentary capacity, at the time when her will was made, was, nevertheless, shown and established by the testimony of witnesses, and the orphans court decree ordering her will to be admitted to probate was affirmed.

Brady v. McBride.

Appeal from decree of Hudson orphans court, admitting to probate the will of Margaret Devine, deceased.

Mr. F. McGee, for appellants.

Mr. J. Garrick and *Mr. G. Collins*, for respondents.

THE ORDINARY.

This is an appeal from a decree of the orphans court of Hudson county, admitting to probate the will of Margaret Devine, deceased, late of that county. The testatrix was a widow. She had never had any children. By the will, which is dated and was made on February 24th, 1876, she gave to her brother, Matthew Brady, for life, a house and lot in Jersey City, then occupied by him (she lived with him at that time), with remainder in fee to his daughter, Margaret Conlon, her namesake, and gave to his other daughter, Mary McBride, the adjoining house and lot, called the Lohman property, in fee. She gave the residue of her estate to her brother Matthew, and appointed him executor. He predeceased her. She died in 1883. He died in September, 1878. The will was executed with all due legal formalities. It was drawn by Mr. Garrick, a lawyer of Jersey City, who also superintended its execution, and was one of the witnesses. The testatrix was blind, and was probably about eighty-two or eighty-three years old. It appears, by Mr. Garrick's testimony, that he drew a will for her in 1874, the instructions for which he received from Matthew, with whom she was then living, but it was not signed. After the draft of it was made, Matthew told Mr. Garrick that he need not call in reference to it until he should be sent for. In February, 1876, shortly before the execution of the will in dispute, Mr. Garrick was sent for to go to the house of Matthew to see the testatrix. He went there and took with him the draft of the will of 1874. That paper gave to Mary McBride the Lohman house and lot, in fee, and all the residue to Matthew. It appointed Thomas Fitzimmons and Mary McBride's husband, executors. The testatrix, after Mr. Garrick's arrival at the house, gave him

Brady v. McBride.

directions to draw the will. It was to differ from the draft of 1874. He took a memorandum of those differences, and then went to his office and made a draft of the will, and had it copied. The next day, or a very few days after he received the instructions, he took the copy to the house, read it over to the testatrix, and asked her if it was correct, and she said it was, and that she was ready to sign it. He says that when he received his instructions from her, he read the draft of 1874, and explained it to her in language that he thought she would understand, because there were some technical words in it; that because she was blind he was very careful to explain it to her thoroughly; that he used "homely" language to her so that she would understand, and that she told him herself what changes she wanted to have made. He further says that she satisfied him that she knew the exact nature of the business—that she thoroughly understood what she was doing. He further says on the same subject, speaking more particularly, that he read the paper of 1874 to her, and explained each clause to her—explained the meaning of it; that he told her that that paper gave the Lohman house and lot to Mary McBride absolutely, and that the next clause gave the other house and lot to Matthew absolutely, and he says she then said she would like to have the latter property go to Margaret after her father's death; that he then spoke of the residuary clause, and he thinks it was read, and he told her it would cover anything else there might be, money in bank and personal property, and she said that that was to go to Matthew. He also says that she was at his office two or three times on other business—in reference to her deceased husband's estate—and that the first time she came was before the will was made.

As before stated, Matthew died in September, 1878. In October of that year a commission of lunacy was, on the application of Mrs. McBride, issued out of the court of chancery, under which, on the 12th of November following, there was an inquisition, by which it was found that the testatrix was of unsound mind, and had been so for the three years next preceding and upwards.

The testimony in reference to her testamentary capacity at the

Brady v. McBride.

time of making the will is conflicting, but the preponderance of it is in favor of her competency. In addition to the evidence of Mr. Garrick, already spoken of, as to what occurred in the conversation between him and her at the time when he took her instructions for the will, there is other evidence in the testimony of Mrs. Conlon of her intelligent action in the matter. That witness says the testatrix requested Matthew to send for Mr. Garrick to draw her will; that the testatrix asked Matthew who drew up her husband's will, and he answered that it was Mr. Garrick, and she said she would like to see him, that she would like to make her will, too; that Matthew said it was time enough, and she replied that it would not cause her to die any sooner, and that she liked to get things off her mind and to have things settled. Matthew then promised to send Mr. Garrick to her, but did not do so until two or three days afterwards. Dr. O'Callaghan attended her about 1877 every day for about a fortnight. She had an inflamed eye. He says she told him her symptoms and explained them satisfactorily, and that at the close of his attendance she settled with him as patients usually do; that he and she reckoned up the number of visits and he stated the charge for each visit; that she endeavored to get him to take less than his regular charge, and that he found her very close and penurious in the payment of bills. He also says that at that time he thought she exercised all her mental faculties reasonably, and that he saw nothing about her at all to lead him to think that she was in any way insane or demented, and that he is very well satisfied that she was sound in mind. Five years afterwards he attended her, and he says she was not insane or demented even then; that she was able to talk and converse then, but was very old and feeble. He adds that he saw nothing wrong about her mind and that he thinks that even then she had testamentary capacity. Patrick McNulty, one of the executors of her husband, testifies that in 1874 or 1875, he thinks it was the latter year, he took \$100 to her from his co-executor, Mr. Layatt; that he went to her room and she requested all others present to withdraw from the room, and that she then shut the door and said to him that she wished him to keep the

Brady v. McBride.

larger portion of the money and give it to her as she should want it. He says she said her reason was that she would avoid the requests of the young people about her for gifts of money. When he asked her how they would know that she had the money, she answered that she was blind, but they could see where she put her money at any time; that she would have to show them what money she had. She took only \$5 out of the \$100 and he retained the rest for her, and gave it to her as she wanted it afterwards through about six months, in payments of \$10, \$20 and \$25. The arrangement between them was that he was to call there every week, but he did not call so frequently. He said that when he called she talked to him on her business; that from the conversation he had with her and his knowledge of her, he had no idea, in 1876, but that she was as sound in mind as he himself was; that she always talked as sensibly to him as she did before she lost her sight. Mr. Layatt, his co-executor before mentioned, did business with her personally in 1874 and 1875, and he thinks in 1876. He says that she objected so much to his management of affairs (his expenditures for repairs &c.), that he was unwilling to go and see her any more, and that the last money he paid her he paid in 1878 through Mr. Fitzsimmons, who lived in the same house in which she lived, and who got her receipt for him therefor. He says he never looked upon her as being "crazy in any way, manner or shape," and that she was as sound in mind the last time he saw her as ever. Hugh O'Reilly saw her very frequently during the last two or three years before Matthew died, which was in 1878. He says she was mentally very smart and shrewd and had a good memory. Thomas Aldridge saw her in 1877 and had conversations with her on business at his office, to which she came. He says he saw nothing to indicate any unsoundness of mind.

Opposed to this testimony on the part of the proponents, is that produced by the caveators, consisting of the opinions of non-expert witnesses as to her competency, with the results of their observation of her mental condition. Their evidence is not such as to counteract the testimony of the witnesses who have testified to her capacity, and whose opportunities for observation were

Brady v. McBride.

quite as good, at least, and their intelligence as great as that of those of the witnesses on the part of the caveators who have testified to the contrary. The application in lunacy was not made until November, 1878 (after Matthew's death), nearly three years after the will was made. The finding of the jury that the lunacy had existed for three years, is not conclusive. Any presumption which it raises is rebutted by the proof that the testatrix had testamentary capacity at the time of the making of the will.

The proof shows that there was great affection between the testatrix and Matthew, so great that his death appears to have overthrown her reason. He not only cared for her tenderly while he lived, but made her welfare the subject of special charge on his death-bed, to his daughter, Mrs. McBride, exacting from her a promise that, come what might, she would always take care of his blind sister. He brought the testatrix from her house in another part of the city to his own, in order that she might live there, in his family, and there is great reason to believe that he did it merely out of affection for her, and because she was not properly cared for at home, but was neglected, if not entirely deserted, by the nephew and niece on whom she relied for care and attention, and whom she had herself brought over from Ireland to live with her. There is no proof of fraud on the part of Matthew or his family to procure the testamentary disposition of her property in his or their favor. On the other hand, it seems that the will which was drawn in 1874, though it gave all her property except the Lohman house, to Matthew, was never executed, and when, in 1876, she proposed to make a will, Matthew endeavored to dissuade her from it, by saying that there was time enough for that. The will of 1876 was less favorable to him than the proposed will of 1874, because it gave him only a life-estate instead of a fee in the property on which he lived. When the circumstances and relations of the testatrix and the beneficiaries under the will are considered, the will must be regarded as a very natural one.

The order of the orphans court should be affirmed. The costs of the appeal, with a counsel fee of \$150 to the counsel of each side, will be paid out of the estate.

Kinnan v. Wight.

MARY L. KINNAN, appellant,

v.

JAMES W. WIGHT, executor, respondent.

1. An executor may pay any claim against the estate, which he is satisfied is just, without requiring a statement of the items thereof, or that it be sworn to.

2. An agreement among all the parties interested in an estate, whereby one obtained a discharge from her indebtedness to the estate, and another received payment from the estate for services to the testator, estops the former from excepting to the executor's account because of such payment.

3. Where an executor has, by retainer, satisfied his own claim against the estate, the orphans court, in passing his account, has jurisdiction to inquire into the validity of the claim, and the legality of his action in retaining therefor.

Appeal from decree of Monmouth orphans court.

Messrs. Robbins & Hartshorne, for appellant.

NOTE.—An executor or administrator's right of retainer at common law is not forfeited by the statute requiring an equal distribution of the assets among the creditors of the estate, *Berry v. Graddy*, 1 Metc. (Ky.) 553; nor by the statute of frauds, *Ibid.*; nor by the act abolishing the distinction between specialty and simple contract debts, *Crowden v. Stewart*, L. R. (16 Ch. Div.) 368; nor by the act in reference to secured and unsecured creditors, *Lee v. Nuttall*, L. R. (12 Ch. Div.) 61; nor by instituting a creditor's suit, wherein he represents himself and all the other creditors, *Campbell v. Campbell*, L. R. (16 Ch. Div.) 198; nor by submitting to account in the ordinary form, *Ibid.*

If the estate be insolvent, he can only come in *pro rata* with the other creditors, *Smith v. Bryant*, 60 Ala. 235; *Jenkins v. Jenkins*, 63 Ind. 120; *Stevenson v. Schriver*, 9 Gill & Johns. 324; *Payne v. Pusey*, 8 Bush 564.

He need not file his claim with the probate court, nor present it to himself for allowance, *Sanderson v. Sanderson*, 17 Fla. 821; *State v. Reigart*, 1 Gill 1; *French v. Winsor*, 24 Vt. 402; *Miller v. Irby*, 63 Ala. 477; unless its amount or justness be disputed, *Middleton v. Middleton*, 8 Stew. Eq. 115; *Hoch's Appeal*, 21 Pa. St. 280; *Ashton v. Miles*, 49 Iowa 564; *Holly's Estate*, 5 Allen (N. B.) 406.

Kinnan v. Wight.

Mr. J. Chetwood, for respondent.

THE ORDINARY.

The appeal in this case is from a decree of the orphans court of Monmouth county, upon the final account of James W. Wight, acting executor of his father, Richard Wight, deceased. By the will of the latter, his estate, after the payment of his debts and funeral expenses, was given to his children, Catharine, James, Ann, Mary, Jacob and Margaretta, in equal shares, with substitution of their children in their stead in case they should predecease him, and with limitation over to the testator's surviving children of the share of any of his children who should die, leaving no children, at any time before the provisions of the will should have been carried out. Power was given to the executor to convert the personal estate into cash, and apply it to the payment of the testator's debts and funeral expenses. Also to sell and convey the real property, and apply so much of the proceeds as might be necessary for the purpose, to pay any part

In some states, he is, by statute, required to present his claim and proceed thereon the same as any other creditor, *McLaughlin v. Newton*, 53 N. H. 531; *Flood's Case*, 16 Abb. Pr. (N. S.) 407; *Smith v. Christopher*, 6 T. & C. (N. Y.) 288; *Barras v. Barras*, 4 Redf. 263; *Keller v. Stuck*, 4 Redf. 294; *Underhill v. Newburger*, 4 Redf. 499; *Gardner's Case*, 5 Redf. 14; *Burnett v. Noble*, 5 Redf. 69; *Kearney v. McKeon*, 85 N. Y. 136; *Williamson v. Anthony*, 47 Mo. 299; *Wright v. Wright*, 72 Ind. 149; *Crosby's Estate*, 55 Cal. 574; *Abbe v. Norcott*, 8 N. H. 51; *Tuttle v. Robinson*, 33 N. H. 104; *Watson v. Watson*, 58 Md. 442. See *Chidester v. Chidester*, 42 Ind. 469.

After his resignation, an administrator occupies the same position towards the estate as any other creditor, *Smith v. North*, 13 Jur. 998; *Fort v. Battle*, 13 Sm. & Marsh. 133; *Smith v. Watkins*, 8 Humph. 331; but see *Prentice v. Dehon*, 10 Allen 353. He may retain after revocation of his letters, *Blackborough v. Davis*, 1 Salk. 38. His assignee may proceed as any other creditor, *Nelson v. Stollenwerck*, 60 Ala. 140; *Snyder v. Snyder*, 96 N. Y. 88; see *Lowe v. Peskett*, 16 C. B. 500; *Chavez v. Schmidt*, 2 C. E. Gr. 257; *Morrison v. Page*, 9 Dana 428. He cannot assign his individual claim to himself as executor, *Schreyer v. Holbarrow*, 20 Hun 468; nor confess judgment for the amount of his claim to one to whom the decedent owed nothing, *Bonistiel v. McMaster*, 6 U. C. Q. B. (O. S.) 32; *Hubbard v. Hubbard*, 16 Ind. 25. See, also, *Phillips's Case*, 6 N. J. L. J. 371; 17 Am. Law Rev. 514.—REP.

Kinnan v. Wight.

of the debts and funeral expenses which might remain unpaid after applying the proceeds of the personal estate thereto. The testator's son James and daughter Catharine were appointed executors. The will was made in March, 1864. The testator died July 7th, 1876, and letters testamentary were granted on the 27th of the latter month to James, the survivor of Catharine, who died in her father's lifetime. The appellant is the testator's daughter Mary. In the summer of 1876, a very few days after the will was proved, suit was begun in New York by Richard W. Van Benschoten and others against James and others, for partition of the land of the testator in the city of New York, and attacking the will as invalid. The result of this litigation was a compromise made by Catharine and Margaretta, with the consent of James, by which they three agreed to pay a certain sum of money in extinguishment of the claims of their adversaries, whether those claims were under the will or otherwise.

This settlement was carried out, and thereupon the three, Mary, Margaretta and James, became entitled to the whole estate. To raise the money to pay the amount agreed upon, it was necessary to mortgage or sell part of the real estate. A house and lot in West Thirteenth street, in New York, already mortgaged by the testator for \$3,000, was accordingly conveyed by James, as executor, to Mary and Margaretta, and they thereupon conveyed to him individually one-third thereof, and the three then mortgaged the property for \$5,000, out of which the \$3,000 mortgage and interest, and all other encumbrances on the property, and the expenses of the loan, were paid, and the balance applied to the payment of the money which it had been agreed should be paid in compromise.

Margaretta was attorney in fact for her father for about eight years before his death. As such, or as agent for him, she advanced money to her sister Mary, the appellant, and took her promissory notes therefor. They and a book account against Mary in favor of the testator amounted, with interest, to from \$2,500 to \$3,000 at the time of his death. It appears that in the spring of 1880 (the testator died in 1876) it was agreed

Kinnan v. Wight.

between Mary and Margaretta that the former should be discharged from all liability to the estate, and that the latter should receive \$1,000 from the estate for her services as attorney for the testator. Accordingly, on the 12th of April in that year, Margaretta signed a paper for Mary, requesting James, as executor, to relinquish all claims of the estate against Mary, and Mary, on the other hand, signed one, in which she requested him, as executor, to pay to Margaretta out of the estate, \$1,000 for her services as attorney for her father. James appears to have consented and agreed to this arrangement between them, and it was acted upon accordingly.

Margaretta had, before the testator's death, borrowed money of James to be used in her father's business, and had given him notes signed with her father's name by her as his attorney in fact, and James had also an account of about \$1,700 against his father for board &c.

The appellant objects to various items of disbursement in the executor's account, on the ground that the bills or claims for which the payments were made were not sworn to, and that the items of the demands therein are not given. The estate was not insolvent. The executor had a right to pay any claim against it which he knew or became satisfied was just, and he was under no obligation to require either a statement of the items or that the claim be sworn to.

There are objections to the allowance of money paid for penalties upon taxes on the real estate; and it is also urged that some items of payment are twice charged in the account, whereas they should have been charged but once only. I do not find any ground for reversing the decision of the orphans court in reference to those matters.

And so, too, of the charges and credits made in reference to the litigation in New York and the settlement thereof, and the objection that the executor ought to be charged with money in respect of rents of the real estate not collected by him.

The agreement that Margaretta should have \$1,000 for her services as attorney in fact of her father, was made by all the parties interested in the estate. The appellant, in consideration

Kinnan v. Wight.

of her consent to it, obtained a discharge of the large debt due to the estate from her. The fact that she made the agreement estops her from objecting to the allowance of the payment in the executor's account. Moreover, it may be added, the amount thus allowed to Margaretta for her services in attending to her father's business (the evidence shows she took care of him also in his old age) for about eight years, was by no means excessive.

As to the respondent's demand against the estate, as before stated, it was upon notes and book account. The former were signed with the testator's name by Margaretta as his attorney in fact. It is argued that she had no authority under her power of attorney to sign notes for her father, because by its terms that instrument gave her authority only to do and perform all such acts as the grantor of the power himself might do in and about the care of his real and personal estate, and renting and collecting the rents of the former, and also to manage and control his general business. She acted as his agent in all the matters mentioned in the power, and, in the transaction of the business, found it necessary to borrow money for him for the purposes thereof. The money which she so borrowed was in fact applied to those purposes. She must be regarded as his agent in borrowing the money. In this proceeding in reference to the executor's account, the borrowing of the money has been proved by the agent herself. So that that part of the respondent's debt which is represented by the notes is established without them, and they are at least evidence of the borrowing of the money. Most of the rest of the respondent's demand consists of charges for board of the testator and Margaretta at his house for about five years just before the testator's death. Margaretta was, as before stated, her father's attendant. That part, as well as the rest of the claim, is satisfactorily established. The executor and Margaretta, as agent for her father, had a settlement at the close of December, 1877, of the accounts for board &c., up to the 1st of January, 1875, and she then gave him a note for the balance due him, signing it with her father's name, by her as attorney in fact.

But it is urged that the orphans court had no jurisdiction to try the question of the respondent's claim against the estate, be-

Merchant's Case.

cause the claim was that of the executor himself. The right of retainer exists by mere operation of law. Where an executor exercises it, he does so subject to inquiry in the orphans court or other tribunal which passes upon his account as to the validity of his claim, and such court has jurisdiction to pass upon the legality of his action in retaining for his debt. *Dolman v. Cook*, 1 *McCart*. 56. Nor is there any reported case in this state holding the contrary doctrine. *Middleton v. Middleton*, 8 *Stew. Eq.* 115, was not a case of retainer. An executor who had not and never had had any part of the estate in his hands, filed exceptions to the account of his co-executors, on the ground that they had refused to allow a claim which he made against the estate. It is obvious that the action of the orphans court in that case, in allowing the claim, was in fact the trial of and adjudication upon a demand against the estate which the executors had refused to allow. *Gray v. Gray* (decided in 1880), which was also referred to on the argument by the appellant's counsel, was a case in the court of chancery upon the claim of an executor, who, after the orphans court had refused to pass upon his claim, on the ground of want of jurisdiction, filed his bill to establish his demand. The question of jurisdiction in the orphans court was not raised in the court of chancery, nor in the court of last resort.

The decree of the orphans court will be affirmed in all respects. No costs of the appeal will be awarded to either side.

In the matter of the exceptions to the account of the administrators of DANIEL P. MERCHANT, deceased.

1. A widow whose dower has not been assigned, and who remains on the homestead farm of her husband, is entitled to the crops grown thereon after her husband's death.

2. Administrators held to account for lambs, the produce of sheep belong-

Merchant's Case.

ing to the estate, born after the intestate's death, and for the wool shorn from the sheep after his death, and also for the net proceeds of the sale of milk from his cows.

Appeal from decree of Morris orphans court.

Mr. A. W. Cutler, for appellants.

Mr. J. H. Neighbour, for respondents.

THE ORDINARY.

Daniel P. Merchant died March 20th, 1880, intestate. His sons, Silas and Frank, and his daughter, Mrs. Hughson, were appointed administrators of his estate. His widow survived him, and was still living when the final account of the administrators was filed. He owned a farm and personal property (farming implements, horses, cattle and sheep &c.) upon it.

After his death his widow continued to reside on the farm, and did so as long as she lived. There were, when Mr. Merchant died, mortgages upon the farm and levies upon some of the personal property under executions issued upon judgments against him. The sheriff and the administrators sold the personal property together in February, 1881, nearly a year after his death. In that month the administrators made a report to the orphans court of personal assets and claims filed, showing a deficiency of about \$7,000, and asked for an order to sell the farm, which was the only real property owned by the intestate. An order to sell was made, and the property was sold in September, 1882. In February of that year, the administrators filed their account, by which it appeared that the estate would not pay more than fifty cents upon the dollar of the debts. To that account some of the creditors filed exceptions. Upon the hearing thereof, the court held that the administrators should be charged with the value of so much of the crops of the farm produced in the year next succeeding the death of Mr. Merchant as, under an arrangement made by Mrs. Hughson with Moses Tucker (who tilled the farm on shares), was to belong to the person or persons whom she represented in the arrangement, allowing, however, the expenses of

Merchant's Case.

marketing it. Also that they should be charged with the value of sixty-one lambs not inventoried, sold by Mrs. Hughson in August and October, 1880, the produce of sheep belonging to the intestate; and also with the value of wool from the sheep which belonged to the intestate, clipped and sold after his death. Also that they should be charged with the proceeds from April, 1880, of the sale (on a milk route) of milk from the cows belonging to the intestate, and served to customers by means of wagons and horses of the estate.

It appears by the testimony that the agreement with Tucker was made after the intestate's death by Mrs. Hughson, who acted in the matter in behalf of the widow, with whom she lived in the homestead. The widow's dower was never assigned. By the statute she was entitled to remain in and hold and enjoy the mansion-house of her husband and the messuage or plantation thereto belonging until her dower should be assigned to her, without being liable to pay any rent therefor. *Rev. p. 320 § 2.* She was, therefore, entitled to the crops.

Mrs. Hughson sold, in the summer and fall of 1880, sixty-one lambs, the produce of sheep of the intestate, and received therefor \$244. The administrators urge that, in charging themselves with the amount of the inventory, they have charged themselves with all that they should answer for with respect to those lambs. The inventory contains an item of sixty-one sheep, appraised at \$6 each. No lambs are inventoried. The appraisers say that the appraised value of the sheep included that of the lambs; that they valued the sheep at \$4 each, and the lambs at \$2 each, but inventoried the former only, and appraised them at the value of both. It is proved that the sheep were worth \$6 apiece. It appears that fifty-six of them were bid in at the sale for Mrs. Hughson, at \$5.50 apiece. The administrators should be charged with the value of the lambs.

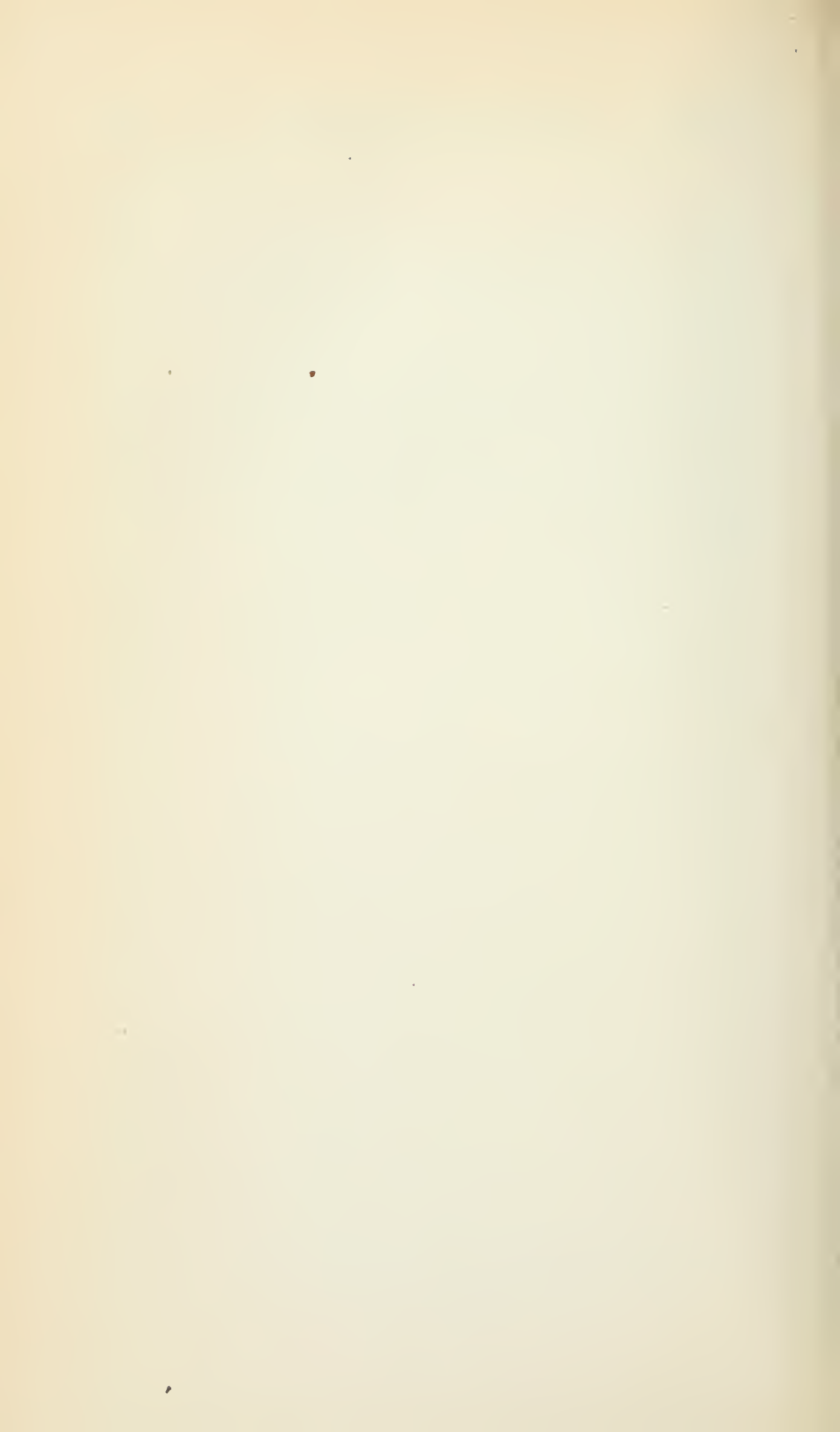
The wool sheared from the sheep belonged to the estate, and the administrators should account for it.

As to the milk, they should account for the net profits made from the sale of the milk, but not for the gross amount of money received from the sales. The net profit for the time during

Merchant's Case.

which the business was carried on, with the property of the estate, after the taking out of the letters of administration up to the time of the sale of the personal property, may be fairly put at the sum of \$450, and with that amount the administrators should be charged.

The result is that the administrators should not be charged with the crops, but should be charged with the money received for the lambs, \$244, and the money received for the wool, \$80, and the net profits of the milk business, \$450. The decree will be reversed, with costs, and the record remitted to the orphans court.



CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
MARCH TERM, 1885.

JOHN GRAY, administrator, appellant,

v.

ELIZABETH GRAY, respondent.

1. On a bill filed by a wife for moneys received for her by her husband, she cannot be a witness to prove the admissions of her husband.
 2. *Quere.* As to the application of the statute of limitations to a debt due from the husband to the wife.
-

On appeal from a decree of the chancellor.

Mr. Alfred Mills, for appellant.

Mr. J. H. Neighbour, for respondent.

Gray v. Gray.

The opinion of the court was delivered by

BEASLEY, C. J.

This bill was exhibited by a widow against the administrator of her husband to recover certain sums of money which belonged to her as her separate estate, by force of the act relating to married women, and which he had received on her behoof during coverture.

One of the exceptions to the proceedings in the court below was leveled at the admission of the testimony of the widow, relating to sundry conversations between herself and her husband, in which he acknowledged the receipt of the moneys in question, accompanying such admissions with promises to repay them when requested. Their conversations were plainly inadmissible, as they were expressly prohibited by the act that qualifies as witnesses the parties to the suit, to a limited extent, when either plaintiff or defendant is such in a representative capacity. But the case of the respondent is not seriously impaired by the rejection of this testimony, for the facts necessary to support her claim are amply proved by the residue of the evidence. It is shown, beyond rational dispute, that the moneys claimed were the property of the wife, and were received by her husband for her during coverture, with the understanding that he would hold them for her benefit and as her *quasi* trustee. It is not to be questioned that under such circumstances, in the absence of qualifying conditions, the estate of the husband must account in

NOTE.—Before the Married Women's Acts, the statute of limitations did not run against the claim of a wife against her husband for money loaned by her to him, until his death, *Towers v. Hagner*, 3 Whart. 48. See *Duke v. Fulmer*, 5 Rich. Eq. 121; *Livesay v. Helms*, 14 Gratt. 441.

So, where her money was loaned, in 1845, to her husband and his partner, who made an assignment for the benefit of their creditors in 1857, *Kutz's Appeal*, 40 Pa. St. 90.

Since the Married Women's Acts, the statute has been held not to run against such a claim, *Sewell v. McVay*, 30 La. Ann. 673; *Upham v. Wyman*, 7 Allen 499; *Boardman's Appeal*, 40 Conn. 169; *Lahr's Appeal*, 90 Pa. St. 510; *Wilson v. Wilson*, 36 Cal. 447; *Marsteller v. Marsteller*, 93 Pa. St. 350; but see *Sabel v. Slighuff*, 52 Md. 132; *Boughton v. Flint*, 74 N. Y. 476; *Muns v.*

Gray v. Gray.

equity, in a suit by the widow, for the moneys thus received and held.

On the argument of this appeal, the statute of limitations was relied on as a bar to this claim. How far the statute referred to is applicable, is obviously a debatable question. That a stale claim of this character would be open to the gravest suspicion, and would often be rejected in a court of conscience on its own peculiar methods of dispensing justice, is evident at a glance; but the statute of limitations is applicable by its terms only to actions at law, and is useful only by analogy in relation to equitable titles and estates. Inasmuch as the wife, during coverture, by force of our statutes and the general regulations of our legal system, cannot sue nor be sued by her husband at law, the act in question can, under no circumstances, be applicable by its terms to debts due to her from him, and the consequence is such debts, in their relation to the passage of time, must be regulated altogether on an equitable basis. But it is not necessary at the present time to do more than to advert to this subject, as, in the present case, it appears that, by allowing the time that the running of the statute is suspended by the death of the debtor, six years had not intervened between the arrival of this right of action and the filing of this bill. This question, therefore, is not in the case.

Let the decree be affirmed.

Decree unanimously affirmed.

Muns (Iowa), 14 Cent. L. J. 457; Simmerson v. Tennery, 37 Ohio St. 390; Brooks v. Brooks, 4 Redf. 313.

Where a husband and wife were tenants by the entirety in lands conveyed to them, the statute was held not to run against the wife during coverture, *Harrer v. Wallner, 80 Ill. 197.*

Where a husband and wife are residing together on land, there can be no adverse possession by one against the other, *Vincent v. Murray, 2 Pugs. (N. B.) 375; Sandford v. Finkle (Ill.), 20 Cent. L. J. 236.* See *Frost v. Frost, 21 So. Car. 501; Westcott v. Miller, 42 Wis. 454.*

The statute does not apply to a suit for a divorce, *Mosely v. Mosely, 67 Ga. 92, 13 Rep. 682.—REP.*

Cubberly v. Cubberly.

SAMUEL D. CUBBERLY, appellant,

v.

JAMES D. CUBBERLY, respondent.

When stipulations are kept out of a contract by fraud, such contract will be reformed in equity, and specifically performed.

On appeal from a decree of the chancellor, whose opinion is reported in *Cubberly v. Cubberly*, 6 Stew. Eq. 82.

Messrs. Robbins & Hartshorne, for appellant.

Messrs. E. L. Campbell and B. Gummere, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

This decree is affirmed on the ground that the stipulation upon which the equity of the respondents depends, was kept out of the written agreement by the covinous contrivance of the appellant; that such stipulation should therefore be incorporated into the contract, and that such contract thus reformed should be specifically performed.

PATERSON, J. (*dissenting.*)

A parol trust here is sought to be engrafted on a written agreement. In such a matter the proof should be very full, clear and beyond suspicion. Not only does that fail to come up to the level of these standards, but, in my opinion, the improbabilities against the alleged fact are strong. For this reason I cannot assent to the conclusions of the court. One of the principal beneficiaries by the compromise testifies that the appellant did not say to her he would give the poor brothers and sisters anything, and does not think she signed any paper expressing that condition. The last agreements of the 15th, 16th and 17th of August, 1877, executed by both beneficiaries while the settle-

Cubberly v. Cubberly.

ment was in progress, and alluded to therein, are not set up in the bill, and so not attacked as fraudulent, though one-half of each share is given by those to the appellant. This suppression is significant. Again, the most pronounced witnesses for the complainants testify that they were induced to agree to give the appellant a moiety of what they would obtain under the settlement, as next of kin, in order that the poor brothers and sisters might derive more benefit than from what they would take as heirs to the real estate. Then why, when the compromise was ratified, did they try to persuade the defendant to accept \$2,000 as his share, and failing in that effort, force him, as it were, to pay \$3,000 to the lawyer of one, and \$4,000 to the son-in-law of the other, after the manner of star route perquisites? What was this, in reality, but robbing a trust they insist was sacred, and created and set apart for the needy relatives, and how can that fact be reconciled, or be consistent with the theory of the bill? Moreover, the complainants insist, for what is proved, if anything about it is, that the defendant agreed to do all the work, pay all the expenses, assume all the responsibilities, and bear all the annoyances attending the litigation of a claim of the nature and magnitude of the one in question, and, if successful, divide the profits, *per capita*, with those who had refused, absolutely, to lend any assistance, or so much even as to lift a finger in behalf of their own interest. The court below decrees, and the decision is sustained here, that the working bee in this hive shall pay more money, principal and interest, to the lazy drones than all he realized as the result of his labors. In other words, he has to pay for the music to which the poor relatives are dancers. I cannot bring myself to assent to the justice or equity of the decision, and am of opinion that it should be reversed throughout.

For affirmance—THE CHIEF-JUSTICE, DEPUE, DIXON, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, WHITAKER—12.

For reversal—PATERSON—1.

Gulick v. Gulick.

WILLIAM GULICK, appellant.

and

MARY F. GULICK, respondent.

When two persons employ an attorney in the same business, communications made by them in pursuance of such common retainer are not privileged *inter sese*.

On appeal from a decree of the chancellor, whose opinion is reported in *Gulick v. Gulick*, 11 *Stew. Eq.* 402.

Mr. G. O. Vanderbilt and *Mr. J. H. Stewart*, for appellant.

Mr. J. F. Hageman, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

In the trial of a case on reference before Vice-Chancellor Bird, an attorney-at-law was offered as a witness in behalf of the respondent, to prove certain statements which had been made to him by the appellant. A motion was made at the hearing to exclude such testimony on the ground that the statements in question were made as part of a privileged communication from a client to his counsel. This contention prevailed, but, on an appeal to him, the chancellor took a different view, holding the testimony admissible for the reason that, in the transaction to which the statement which was offered to be proved related, the attorney in that business was acting professionally for both appellant and respondent, and that, as a consequence, what either of such parties stated was not private nor privileged *inter sese*. The evidence fully sustains the conclusion that this was the attitude of the attorney towards these litigants in the matter referred to, and, such being the situation, the law reasonably declares that the attorney being the adviser of both parties cannot be regarded as the depositary of confidential communications from the one side or the other. I have never supposed that the rule of law

Chetwood v. Berrian.

on this subject was in any degree uncertain ; it is to be found in any of the text-books. Thus, Mr. Wharton says, vol. 1 § 587 : " It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger, their communication to the lawyer would be privileged. It is otherwise, however, as to themselves ; as they stand on the same footing as to the lawyer, either could compel him to testify against the other as to their negotiations."

The only difficulty in the case was to establish the *status* of the attorney as the common counsel of these parties ; the case is not very conclusive with respect to all the communications in question, and this was probably the point of difficulty before the vice-chancellor ; but that question being settled, the pertinent rule of law is not in doubt.

Let the order appealed from be affirmed.

It is proper to add that it is not to be inferred, from the foregoing decision, that the question whether an order of the character of the one brought up for review in this case is appealable, has been considered by this court. The point was not raised, and is not adjudged.

Decree unanimously affirmed.

GEORGE R. CHETWOOD, appellant,

v.

THOMAS B. C. BERRIAN, respondent.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Chetwood v. Berrian*, 12 *Stew. Eq.* 203.

Mr. B. Williamson, for appellant.

Mr. John R. Emery, for respondent.

Freehold and New York Railway Co. v. Hodgson.

The opinion of the court was delivered by

BEASLEY, C. J.

The court is clearly of opinion that the appellant is not entitled to the relief sought by him, on the ground that, even on the assumption that he had the equitable right asserted by him in his bill, such right was lost by his failure to enforce it within a reasonable time after the discovery of the fraud of which he was the victim.

No opinion is intended to be intimated on any other part of the case.

Let the decree be affirmed.

Decree unanimously affirmed.

THE FREEHOLD AND NEW YORK RAILWAY COMPANY,
appellant,

v.

TELFAIR HODGSON, respondent.

JAMES P. LOWREY, appellant,

v.

TELFAIR HODGSON, respondent.

The holder of a decree against an insolvent railway corporation who, as director of a new corporation, with full knowledge, consents to the subsequent acceptance of a deed from a receiver to it, free from all encumbrances, under the statute, and votes to execute a mortgage for the security of bond-holders, which shall be a first lien—*Held*, not entitled, on petition, to execution and sale of land of the company, with priority.

On appeal from an order advised by Vice-Chancellor Bird, whose opinion is as follows :

Freehold and New York Railway Co. v. Hodgson.

The petition shows that Rue obtained a decree in this court on which a balance was due, and that he (the petitioner) took an assignment for a valuable consideration of one-half of that balance. The petition also shows that the lands of the defendant company have been conveyed to the Freehold and New York Railway Company, subject to the lien of his decree, and prays for a *fi. fa.* to make his money.

The Freehold and New York Railway Company and Mr. James P. Lowrey insist that there is nothing due to the petitioner. They urge that his interest was all sold and transferred by the proceedings in this court at the suit of Emson against the defendant company as an insolvent corporation, by the receiver appointed, who sold all the assets under an order of the court; and if not thereby sold and transferred, said interest was, in equity, sold and transferred, or that he agreed to transfer it to Lowrey; and if neither of these insistments be mentioned, then he is estopped as against the New York Railway Company.

1. I do not think the rights or interests of the petitioner were affected by anything which the receiver did. I do not find that he was a party, in his individual capacity, in those proceedings. He was president of the defendant company, it is true, and in that suit, as such, the writ was served upon him; but our courts have uniformly held that proceedings against a defendant in a representative capacity, do not render it proper or necessary for him to answer in his individual capacity. *Wade v. Miller*, 3 Vr. 296; *Kirkpatrick v. Corning*, 11 Stew. Eq. 234.

2. Nor do I find that there is any obligation, in equity, resting on the petitioner to assign or transfer his interest in said decree by virtue of the alleged agreement between him and Mr. Lowrey. I do not find that any agreement was consummated. That the two were negotiating is very certain, but there is no proof that they were ever of one mind upon the entire scope of the propositions submitted. A fair test would be the application of the doctrine at the foundation of the jurisdiction for specific performance. It seems to me that if the respondents were complainants in such case, with the testimony as it now stands before me, their failure would be most certain, because of the absence of a valid or binding agreement.

Freehold and New York Railway Co. v. Hodgson.

3. It seems equally clear to my mind that the doctrine of estoppel cannot be made available. It is said that when the assets of the Freehold and New York Railway Company were pledged by mortgage, the petitioner was present, and that in his presence and by his vote, it was resolved that that mortgage should be the first lien on all the lands &c. of the Freehold and New York Railway Company. Supposing this to be true, it is very clear that, so far as the petitioner was concerned, everything that he did or consented to was in contemplation of the completion of his agreement, as he understood he had made it, with Mr. Lowrey. Besides, as the case stands before me, there is no room, under any circumstances, for the doctrine invoked. Mr. Lowrey is not in an attitude to stand on such a defence. He was a party to the negotiations, and knew that the alleged agreement had not been carried out. He also knew that the petitioner had no interest in the Freehold and New York Railway Company, outside of that agreement, for, although he was named as a director thereof, there was only one share of the stock in his name, and that, I think, he did not own, he being a mere figure by way of counting, to aid Mr. Lowrey in perfecting his railway project, and counting only at the instance of Mr. Lowrey. Therefore, Mr. Lowrey is not sustained by the equitable principle contended for, nor is the Freehold and New York Railway Company, for at that time, as I read the testimony, Mr. Lowrey was to all intents, the company. The entire management was in his hands. At the period of time referred to, whatever acts others joined in, it seems to me they were at the bidding or direction of Mr. Lowrey. I think the petitioner is entitled to the writ he asks for, with costs, and shall so advise.

Mr. W. H. Vredenburg, for appellants.

Mr. Joseph F. Randolph, for respondent.

These two appeals were argued together, and as they involve substantially the same facts, are so considered and decided.

A final decree was rendered in the court of chancery on November 9th, 1874, in favor of Jacob B. Rue, complainant, against the Monmouth County Agricultural Railroad Company,

Freehold and New York Railway Co. v. Hodgson.

for unpaid purchase-money on sale of lands described in the decree, amounting to \$2,497.70, including costs of suit. This decree was assigned by Jacob B. Rue to John S. Schultze and Telfair Hodgson, January 26th, 1875, each paying one-half of the whole sum due on it. Prior to this decree, on October 1st, 1872, the Monmouth County Railroad Company had executed to William H. Brown and William Statsir, trustees, a mortgage on their railroad, lands, ways, franchises and rights, to secure bonds to be issued, to the amount of \$700,000. Two judgments were obtained by other parties prior to the decree in Rue's action. On November 23d, 1875, Christian D. Emson, a stockholder, on behalf of himself and other stockholders, filed a bill to have the company declared insolvent, charging that the \$700,000 mortgage and the bonds issued thereon were illegal, and praying for the appointment of a receiver and other relief. This bill made Schultze a party as assignee of the Rue decree, but not Hodgson (as his assignment was not recorded), but Hodgson was served with process as president of the Monmouth Agricultural Railroad Company, which was made a party to the suit. On December 10th, 1875, a receiver was appointed. On December 14th, 1875, the receiver filed a petition, setting forth, among other things, that the property was encumbered with a mortgage, the legality of which was brought in question, and that the property was of a character materially to deteriorate in value pending the litigation, and praying that he might be ordered to sell the real and personal estate and franchises of the company, free and clear of and from all encumbrances, the proceeds of sale to be brought into court to abide its further order, pursuant to the statute. A decree to that effect was made December 28th, 1875, and on March 21st, 1876, the receiver sold and conveyed to James P. Lowrey all the railroad property and franchises, free and clear of all encumbrances, for the sum of \$115,000. At that time only the right of way had been purchased, and some grading done. The bonds issued under the \$700,000 mortgage, amounting to \$71,000, were satisfied and canceled, and all debts and liens of the company settled, including the one-half of the Rue decree assigned to Hodgson. This

Freehold and New York Railway Co. v. Hodgson.

Lowrey claimed to own, and receipted for it to the receiver July 3d, 1877. Lowrey conveyed to the Freehold and New York Railway Company all the property transferred to him by the receiver under the decree of the court of chancery. A mortgage for \$100,000, and bonds to be secured thereby on the railroad were directed, by resolution of the company, to be issued to John N. Whiting, trustee. The bonds were described therein as first-mortgage bonds, and were issued July 1st, 1878; another mortgage to secure \$200,000 was executed, and bonds issued to take up the prior \$100,000, and provide for the extension of the road to Keyport, and this, by its terms, was to be a first lien on the railroad. On May 20th, 1882, Mr. Hodgson filed his petition in the original action of Jacob B. Rue against the Monmouth County Agricultural Railroad Company to be made a party, and have execution for the amount claimed by him under the decree, and on October 28th, 1884, an order for execution and sale was made. From this order the present appeal was taken by Lowrey and Whiting.

The opinion of the court was delivered by

SCUDDER, J.

The petitioner claims that being the purchaser and owner of an undivided half part of the decree rendered in favor of Jacob B. Rue, a land-owner, November 9th, 1874, he is entitled to execution to sell the lands named therein, to satisfy his debt, with interest and costs. These lands are now part of the road-bed of the Freehold and New York Railway Company, which purchased the road and franchises of the Monmouth County Agricultural Railroad Company, an insolvent corporation, and is now using them for railway purposes under its charter. The appellant, James P. Lowrey, purchased the property at the sale made by the receiver appointed by the court of chancery, and having completed the railroad, transferred and conveyed it to the Freehold and New York Railway Company. Being still interested therein as stockholder and bondholder, grantor and part owner of the decree, Lowrey was made a party under the

Freehold and New York Railway Co. v. Hodgson.

petition, and has appealed from the order awarding execution and sale. John N. Whiting, the other appellant, to whom the mortgage was made in trust for \$200,000 to secure bondholders, has also appealed from this order, to save the rights of those whom he represents.

The property of the insolvent company having been sold by the receiver under the act of 1866 (*Rev. p. 192 § 84*) clear of encumbrances, it is first argued that this decree, owned in part by Hodgson, has been thereby canceled, and that the only claim he can have is upon the proceeds of sale in the court, or in the hands of the receiver. But Hodgson was not made a party to the bill filed by Emson, as an individual, but only as president of the Monmouth County Agricultural Railroad Company. Lowrey assumes to act on settlement with the receiver, not only as representing the one-half of the decree which had been transferred to him by Schultze, but also for Hodgson's half, which is claimed in these proceedings. It is obvious that Hodgson could not be bound by a decree in the action, wherein he was not made a party, nor could the fact that he was made such, as the presiding officer of the insolvent corporation, affect his private and individual interest, or take away the encumbrance of his share of the Rue decree. Parties having adverse interests must be made parties in action. *Wade v. Miller*, 3 Vr. 296; *Middleton v. N. J. West Line R. R. Co.*, 10 C. E. Gr. 306; *Williamson v. N. J. Southern R. R. Co.*, 10 C. E. Gr. 13; *Kirkpatrick v. Corning*, 11 Stew. Eq. 234.

But Lowrey did not act without some show of authority in settling this decree, for, at the time, he was negotiating with Hodgson for the purchase and transfer of the latter's interest in it. Both were promoters of the railroad, and had shown great interest in its success. The formal offer for the purchase of the railroad was made by Lowrey to the receiver on March 15th, 1876, and on March 16th, 1876, he had written to Hodgson these words:

"I have arranged as respects all the debts known to me, except the Rue judgment, of which, as I understand, you own one-half. Please tell me, at your earliest convenience, exactly what interest you have in this judgment, and what amount you will take in discharge thereof."

Freehold and New York Railway Co. v. Hodgson.

On May 29th, 1876, he again wrote to Hodgson that he had completed the matter of the transfer to him of all the properties which were of the Monmouth County Agricultural Railroad Company, and requested to see him for a short time in connection with that matter, and asked that he would stop in the office and see him. Shortly after, and in the latter part of May, or prior to June 3d, 1876, he did call, and, as Lowrey testifies, he fully stated to him the then exact position of affairs, and showed and read to him the proposition he had made to the receiver, Dickinson, and Hodgson agreed to look over his situation with respect to the railway company, and communicate with him, what he wished to have done, with respect to his interest in the affair. Before June 3d he called again, and presented a paper written by himself, which was offered in evidence, showing his account with the company, including what he had paid on stock, his share of the Rue judgment and sundry amounts paid by him for the company, amounting in all to \$15,086.50. This sum was divided in half in the statement, showing a product of \$7,543.25, and opposite this was written "seventy-six shares stock." On June 2d, 1876, a letter was written by Lowrey to Hodgson, stating, among other things:

"I propose that you shall assign to me all your claims and rights of every nature upon the old company, including moneys advanced, the Rue judgment, and everything, upon my agreeing to cause to be issued to you upon the actual organization of the new company, not later than September 15th next, seventy-five shares of \$100 each, of the capital stock of the new company, upon a basis of a capital of \$200,000, or in that proportion, in whatever sum the capital may be fixed."

On June 15th, 1876, Hodgson replied by postal card:

"I was to see you to-day, but you were out; will arrange the contract you sent as you wish, and bring it over soon."

On July 13th, 1876, Hodgson again wrote:

"In regard to the assignment of my claim &c., I will have it arranged, and bring it over before long."

Freehold and New York Railway Co. v. Hodgson.

Meanwhile, Lowrey entered into possession of the railroad under deed from Dickinson, receiver, dated March 17th, 1876, acknowledged May 17th, 1876, and recorded May 30th, 1876, about which time the deeds appear to have been delivered, having satisfied or paid \$71,000 of bonds issued on the \$700,000 mortgage, and other outstanding claims amounting to over \$115,000, and constructed the railroad from Freehold to Keyport. These were all preparatory to the organization of the new company. The Freehold and New York Railway Company was incorporated June 29th, 1877, and by deed dated July 3d, 1877, James P. Lowrey conveyed to this company the railroad and franchises, reciting therein, among other things, the receiver's deed to him. Mr. Hodgson was an incorporator and director named in the articles of association of the new company, which were signed by him. At the first meeting of the directors, June 29th, 1877, he was present, voted to accept the deed from Lowrey, and for the mortgage to be executed to Whitney, as trustee, to secure an issue of \$100,000 of bonds of the company to pay for the road; and he was also present at a meeting of the directors September 19th, 1877, when a report was made of the conveyance by Lowrey and the execution of the mortgage to Whiting, which he voted to accept. Subsequently, in June, 1878, the board of directors of the railroad, of which Mr. Hodgson was still a member, directed, with his knowledge and concurrence, another mortgage to be made to Whiting to secure \$200,000 of bonds of the company, whereof \$100,000 in amount was to be reserved for exchange for the bonds of 1877; and it was resolved that this mortgage should cover, and be the first lien upon all the property of the company. Shortly before the organization of the new company, on or about June 1st, 1877, Mr. Lowrey executed and delivered to Mr. Hodgson an agreement dated May 15th, 1876, setting forth that, in consideration of the assignment to him of all the latter's claims of every nature against the Monmouth County Agricultural Company, he would cause to be issued to him seventy-five shares of the capital stock of the new company according to the terms of his proposition, above set forth. This paper was received by Mr. Hodgson,

Freehold and New York Railway Co. v. Hodgson.

and has been retained by him without objection as to its terms, and without demand for the shares, or any action by him until the petition in this case was filed on June 9th, 1882. Mr. Lowrey testifies that he has been continuously ready from the time the stock-books of the Freehold and New York Railroad Company were opened, about July, 1877, to deliver to Mr. Hodgson the seventy-five shares of stock in shape of a certificate in his own name, with blank assignment, which he produces and tenders to the petitioner.

Mr. Hodgson went to reside in the state of Tennessee in 1878, where he has since lived, and there has been no communication between the parties since that time. Lowrey now says that he had forgotten that the actual transfer of the seventy-five shares had not been made to Hodgson, and Hodgson testifies that he was easy, supposing his lien was good under the Rue decree and could not be taken from him without some further act or assignment on his part. He seems not to have known, or to have forgotten, that he has so acted as to exclude all evidence of his claim against those who have subsequently acquired rights in this railroad, and that he is estopped by his conduct from enforcing his assigned decree against them in the form sought in his petition, that is, by a sale of a part of the road under execution, which would cut off the deeds of conveyance made by the receiver to Lowrey, and from Lowrey to the Freehold and New York Railroad Company, the two mortgages to Whiting, and the bondholders secured thereby. He had knowledge and participated in the transfer of this title and its acceptance, and in the creation of these securities, which were declared to be first liens on all the property of the railroad, as already appears. He admits that he was present at the meeting of directors, but says he was silent while the board was acting in these matters. But the concealment of his claim of a prior lien by virtue of the Rue decree evidently misled Lowrey, who transferred the title to the new corporation and accepted their bonds in part payment, on the assurance that they should be first liens, and upon the agreement which had been made between them that seventy-five shares of the capital stock of the railway company would be accepted in

Keen v. James.

payment for the share of the decree held by him, and the other indebtedness of the original company. His silence will be presumed, under the circumstances, to have been maintained with the intention that others should act, and if they acted to their detriment and to his advantage, he will be concluded. He was not only silent, but aided by his votes to put them in this position. Whiting, who represents, as trustee, the bondholders secured by mortgage, so far as appears in the evidence, took the mortgage in good faith, supposing it to be the first lien on the railroad, and cannot in this way be affected by the claim of priority of the Rue decree. This decree must be postponed to the rights of the new company acquired without notice of the petitioner's intention to insist on its priority, for he assented that the title should be free from all encumbrances; and to the rights of the mortgagee and bondholders of the new company, who have taken them as first liens on the railroad property, for he consented to this priority. His remedy against Lowrey remains unaffected by these proceedings, but his petition for the sale of the land of the company, under execution, must be dismissed. The order for execution and sale will be reversed, with costs.

Decree unanimously reversed.

OSCAR KEEN, complainant and respondent,

v.

EXECUTORS OF WM. JAMES, deceased, defendants and appellants.

1. If a vendor conceals from the vendee some fact which is material to the interest of the vendee, which is within the knowledge of the vendor, and which it is his duty to disclose, the concealment is fraudulent, and vitiates the sale.

2. A duty to disclose exists when it expressly appears, by the language of the parties, or is necessarily implied from the circumstances of the case, that one party is actually reposing trust and confidence in the other, and the latter knows it.

3. When a vendor, before and without reference to any sale, has published false statements touching the value of the article sold, and in the negotiations

Keen v. James.

for sale he is apprised that the vendee has heard those statements, and is relying on their truth in making his purchase, and has no available means of ascertaining their falsity, silence on the part of the vendor is a fraudulent concealment vitiating the sale.

4. When a sale of bank stock, belonging to an estate, was effected by one of three executors through a fraudulent concealment—*Held*, that the vendee could rescind the sale, and was entitled to a decree against all the executors for re-imbursement out of the estate, not only of the purchase-price, but also of any assessments upon the stock which he had been legally compelled to pay as shareholder.

On appeal from a decree advised by *Barker Gummere, Esq.*, advisory master, whose opinion follows :

The causes above stated were referred to me, as advisory master, for hearing, and by consent of counsel in open court were heard together ; the proofs and exhibits taken and offered being evidence in each and all of the causes, so far as relevant in each.

I therefore, upon said proofs and exhibits, report to the chancellor my findings of fact and of law, and the decree which I advise to be made in each of said causes.

1. I find, as matter of fact, as follows : William James, in his lifetime and at his decease, was a director in the Mechanics National Bank of Newark, and owned one hundred shares of the capital stock. He died about January 23d, 1881 ; left a will, and appointed O. L. Baldwin, George F. Tuttle and his wife, Elizabeth James, executors, who proved the will on February 5th, 1881, and O. L. Baldwin became the active executor.

O. L. Baldwin, at the time of the death of Mr. James, was, and had been for many years, the cashier of said bank, and during a period of ten years prior to its failure had been continuously unlawfully paying over funds of the bank to Nugent & Co., of Newark. As early as in the year 1874, the amount he had so unlawfully advanced was about \$400,000, and the amount was continually increased, month after month, until it amounted, at the failure of the bank in October, 1881, to more than \$2,000,000. This defalcation, which had been carefully concealed by Baldwin, and was not actually discovered until October, 1881, extinguished the capital stock and rendered the

Keen v. James.

holders of the stock legally liable to be assessed to an amount equal to the par value of their respective shares.

In May, 1881, Mr. Baldwin and Mr. Tuttle, two of the executors of James, consulted together respecting these one hundred shares of bank stock and agreed to sell them.

In July, 1881, one Warren N. Trusdell, a broker doing business in Newark, called on Christian Wolters and asked him to buy fifty shares of the stock of this bank, recommending it as a good investment. Wolters agreed to buy them for \$4,662.50, and by Trusdell's direction went to the bank and handed to Baldwin his check for the above sum as and for the purchase-money of said shares of stock, and at the same time asking Baldwin "if it was a good purchase," to which Baldwin replied "Yes," and said something about the dividend. The dividend was payable on August 1st, 1881. Baldwin gave to Wolters a formal and proper "certificate" for fifty shares of stock, accepted the check, and after paying a part of the proceeds thereof to Trusdell, the broker, deposited the balance to the credit of the James estate in said bank. He also, as executor of James, transferred on the transfer-book of the bank fifty shares of the stock belonging to the James estate to Christian Wolters, and the proper corresponding entries were made in the stock-ledger of the bank.

On August 17th, 1881, Oscar Keen purchased ten shares of the capital stock of said Mechanics National Bank from Oscar L. Baldwin, and paid him therefor the sum of \$930. Baldwin delivered to him a formal and proper "certificate" for said shares, and transferred to Mr. Keen, upon the transfer-book of the bank, as executor of James, ten of the shares belonging to the estate of James, and the proper corresponding entries were made in the stock-ledger; and on August 24th, 1881, Baldwin deposited the proceeds of the sale of said shares to the credit of the James estate in said bank.

On August 23d, 1881, A. V. Van Fleet purchased thirty shares of the capital stock of said Mechanics National Bank from Oscar L. Baldwin, and gave him his check for \$2,798, as the purchase-money thereof, and received from him a formal and

Keen v. James.

proper "certificate" for said shares. Baldwin, as executor of James, transferred to Mr. Van Fleet, on the transfer-book of the bank, thirty of the shares belonging to the estate of James, and the proper corresponding entries were made in the stock-ledger, and on August 24th, 1881, deposited \$2,760 of the proceeds of the sale of said shares to the credit of the James estate in said bank.

On September 1st, 1881, Anna M. Keen, executrix of George Keen, deceased, acting by the advice of and through her son, Oscar Keen, purchased ten shares of the capital stock of said Mechanics National Bank from Oscar L. Baldwin, and gave him her check for \$935, as the purchase-money, and received from him a formal and proper "certificate" for said shares. Baldwin, as executor of James, transferred to her, on the transfer-book of the bank, ten of the shares belonging to the estate of James, and the proper corresponding entries were made in the stock-ledger, and on September 2d, 1881, Baldwin deposited the sum of \$935 to the credit of the James estate, in said bank. This sum is of precisely the same amount as that paid to him by Mrs. Keen, by her check on the previous day, and I find that, in fact, the sum so deposited was the purchase-money of said ten shares of stock.

On July 6th, 1881, a statement of the condition of the said Mechanics National Bank was published in the Newark Daily Advertiser, pursuant to the requirements of the act of congress (*U. S. Rev. Stat.* § 5211), signed and sworn to by Oscar L. Baldwin, cashier, in which it was stated that there was "due from approved reserve agents \$1,808,174.19," at the close of business on June 30th, 1881. The only reserve agent of the bank at that date was the Mechanics National Bank of New York, and from an account stated, made by that bank to the Mechanics National Bank of Newark, pursuant to the custom of their mutual dealing, and stating their mutual dealings from June 16th to July 16th, 1881, and which was received without objection, then or afterward, by the Newark bank, it appears that there was, in fact, due from the reserve agent, the New York bank, only the sum of \$135,007.63. The published statement aforesaid was false. If the condition of the bank had been truly stated therein,

Keen v. James.

it would have shown a deficiency of assets to meet its liabilities, including its capital and alleged surplus of \$1,673,166.56, and that the capital stock was not only without value, but that each holder was then legally liable to be assessed one hundred per cent. of the par value of the stock held by him for the payment of the debts of the bank. Wolters, Keen and Mr. Van Fleet had each seen this statement before making the several purchases of stock aforesaid, and it was one of the inducements to each to make said purchases. None of these purchasers knew that the shares they had purchased belonged to the estate of James until they discovered that fact after the bank had become insolvent.

The Mechanics National Bank of Newark closed its doors and proclaimed its insolvency on October 31st, 1881, and on November 2d, 1881, was formally adjudged, by the comptroller of the currency, to be insolvent, and Frederick Frelinghuysen was duly appointed receiver thereof; and on November 16th, 1881, the said comptroller, pursuant to act of congress (*U. S. Rev. Stat. § 5151*), assessed upon each holder of the stock of said bank the amount of one hundred per cent. of the par value of the shares held by him, and directed the receiver to collect the same.

By virtue of this assessment, the purchasers of the aforesaid shares of stock from Oscar L. Baldwin became severally lawfully bound to pay, in respect of the shares respectively purchased by them, and they have severally paid to the said receiver, since the filing of their several bills in this court, the following assessed sums, together with interest thereon from November 2d, 1881, to wit: Christian Wolters, the principal sum of \$2,500; Oscar Keen, the principal sum of \$500; Abraham V. Van Fleet, the principal sum of \$1,500, and Anna M. Keen, executrix of George M. Keen, deceased, the sum of \$500, together with interest on said respective sums from November 16th, 1881, the date of said assessment.

During the period between September 21st, 1881, and the closing of the doors of said bank on October 31st, 1881, the sum of \$52,445 was drawn out from the amount deposited therein to the credit of the estate of James.

On November 19th, 1881, Messrs. McCarter & Keen, as at-

Keen v. James.

torneys of the several above-named purchasers of the said shares of stock, demanded of the defendants, the executors of James, the rescission of the several contracts of sale of said shares; tendered the certificates for the shares and all dividends that had been paid thereon to the several purchasers, and demanded the return of the purchase-money paid by each, and that each should be indemnified by said executors against the payment of any assessment in respect to said shares of stock. These demands were not complied with, and each of said purchasers filed his bill, in December, 1881, against said executors, praying that they might be decreed to pay to each the purchase-money paid by him to Oscar L. Baldwin for the said shares of stock, with interest from the date of the purchase, and that said executors might be decreed to indemnify them, severally, against any assessment in respect to said shares, or to repay to each such amount as he might be compelled to pay under any such assessment, with interest, and for general relief.

On December 2d, 1881, and during the pendency of these causes in this court, the directors of the Mechanics Bank of Newark made a proposal to the shareholders, depositors and creditors of the bank, in which, among other things, they offered to pay to the several shareholders the amounts assessed on their respective shares, on the condition that they would transfer their shares, with all their rights therein or in respect thereto, to some person to be designated by the directors, and upon the further condition that the proposal should be accepted, in writing, by all the shareholders, depositors and creditors (excepting depositors whose deposits did not exceed \$200), within sixty days from the above date. On January 30th, 1882, the solicitors of Wolters, Mr. Keen and Mrs. Keen, three of the complainants, and the defendants, signed a stipulation, in which it was agreed that the said complainants might accept the said proposal made by the said directors, without prejudice to the legal rights of the respective parties to the said causes; and that any moneys received by the said complainants, respectively, consequent upon the acceptance and carrying into effect of said proposal, should be credited by them respectively to said defendants on any

Keen v. James.

amounts recovered by said complainants in their said respective suits. Afterwards, and in order to avoid the transfer of their shares to the directors, if the said complainants accepted the proposal aforesaid, the solicitors of said complainants proposed to the solicitors of the defendants to sign another stipulation, agreeing that the complainants might receive the amounts of the assessments upon their respective shares from said directors, and that the shares should be assigned to the person named by said directors upon the final determination of the causes, and not upon signing the acceptance. The defendants' solicitors rejected the proposed stipulation, and the complainants' solicitors refused to sign an acceptance of the said proposal of the said directors. The money was not paid by the directors to the three complainants or their solicitors, and it is not proved that all of the shareholders, depositors or creditors of the bank, other than the three complainants, accepted the proposal of the directors, or that the directors waived the conditions of their proposal towards the three complainants.

2. I find, as matter of law, as follows: the fact that the several complainants, at the time that they respectively purchased these shares of stock, had no knowledge that the shares belonged to the James estate, does not change the equities between the several complainants and the defendants. The sale was, in fact, made by Oscar L. Baldwin, as an executor of the will of William James, after consultation with his co-executor, Mr. Tuttle; the shares were transferred by him, as such executor, and the proceeds of sale were deposited to the credit of the James estate, and formed part of the amount subsequently drawn out of the bank by the executors, or some of them. There is nothing in the testimony to warrant the conclusion that either of the complainants was dealing with Baldwin upon his exclusive responsibility, and upon the discovery that he was in fact acting as executor, and for the estate, they have the right to resort to the principal thus disclosed for such redress as they are entitled to. *Benjamin on Sales* § 237; *Perth Amboy Co. v. Condit*, 1 Zab. 659.

The legal title to the shares in question vested in the executors of James, from and after the probate of the will; and although

Keen v. James.

they hold such title *in autre droit*, they had as complete a *jus disponendi* as if the shares were their own proper goods, and their sale and assignment of them to *bona fide* purchasers would vest in such purchasers an absolute title. *Schouler on Exrs.* § 239; *Leitch v. Wells*, 48 N. Y. 585.

And as the sales of these shares were made during the statutory year next after probate, which is allowed for the conversion and administration of the assets, the purchasers were not bound to see to the application of the purchase-money; nor were they affected by the fact that the executors sustained the relation of trustees towards the creditors and beneficiaries of the testator. *Field v. Schieffelin*, 7 Johns. Ch. 150.

Inasmuch as the will of William James does not otherwise direct, the executors of his will are one person in contemplation of law; their title and authority are joint and entire, and the act of one, within the scope of such authority, is the act of all. *1 Went. Off. Ex. ch. 9*; *Schouler on Exrs.* § 400. And it results, from this legal entirety, that knowledge acquired by, or notice given to, one executor, in the course of his administration, is the knowledge of and notice to them all.

But, to have this effect, such knowledge must be acquired by, or notice given to, the executor after he has entered upon his duties, and during the course of his discharge thereof; knowledge acquired by him previously to assuming the administration cannot charge his co-executors, nor affect the estate. *Sooy v. State*, 12 Vr. 394, 400.

Oscar L. Baldwin, after he entered upon the discharge of his duties as executor, was continuously charged with the burden of administration of the assets of the estate, and, among others, of the shares in question in this cause, and it was his duty to use due diligence, to make inquiry for and ascertain any facts which would affect their value. Having, as cashier, constant access to the books and papers of the bank, and an intimate knowledge of its daily transactions, it was continuously his duty, as executor, to avail himself of the knowledge he thus acquired respecting the value of its shares; and while it is true that he knew, before he became executor, of the defalcations he had committed

Keen v. James.

before that date, it is equally true that after he became executor he was continuously committing additional defalcations, and continuously knew that the shares in question were not only valueless, but that, by reason of the ownership thereof, the estate was liable to an assessment of one hundred per cent. of the par thereof. During all the period from the probate to the dates of the respective sales of these shares to the complainants, he was charged with the duties and acting in the office of the active executorship of James; it was his duty to acquire information respecting the condition and value of these shares, and it would be a metaphysical, not a legal, distinction to hold that his knowledge was acquired only as cashier, and that it was withheld from him as executor. The knowledge was lodged in the mind of the man during the time that he was charged with and discharging the duties of executor, and, as executor, he knew the facts.

Even if Baldwin's co-executors be held not to have been affected with his knowledge of the worthlessness of the shares at the time of the several sales thereof, yet, within a few months thereafter, and within the statutory year of administration, and whilst, in presumption of law, the executors still held the purchase-money thereof for the benefit of the estate, they were apprised of his fraudulent misrepresentations to, and concealment of facts by him from, the purchasers of said shares, and with such knowledge, the executors refused to make redress, and retained the moneys and benefits derived by means of such misrepresentation and concealment of facts. Under these circumstances, although, perhaps the complainants could not maintain an action for deceit against the executors, yet there can be no doubt of their several rights to rescind the contracts of sale within a reasonable time, and to require the repayment of the purchase-money and indemnity against the assessment. They did rescind within a reasonable time, and the executors, by such rescissions, and the tenders accompanying the same, were not placed in any worse position than they were in prior to these sales. *Kennedy v. McKay*, 14 Vr. 288.

In the case of the sale of the shares to the complainant Wolters, there were both fraudulent misrepresentation of facts and fraudu-

Keen v. James.

lent concealment of facts by Baldwin. He not only knew that the shares were of no value, but that Wolters, by purchasing them, would be liable to be assessed to an amount equal to the par of the stock. He knew that these facts were vital to the transaction, and that Wolters was acting upon the presumption that those facts did not exist, and that if he knew them, he would not purchase the shares. He was, therefore, bound to disclose the facts, and to tell the truth. He did not, but, on the contrary, told Wolters that the purchase was a good investment, thus confirming like representations theretofore made by Trusdell, who conducted the negotiations for the sale as Baldwin's broker, and who was compensated by him. This was active fraud, and vitiated the sale.

In the case of the respective sales to Mr. Keen, Mr. Van Fleet and Mrs. Keen, there was no misrepresentation by Baldwin, or by Trusdell to the purchasers. The report made by the bank to the comptroller of the currency was signed and sworn to by Baldwin, in the discharge of his duty as *cashier*; it was a strictly *official* act, in that capacity, and an act required by law; it was not a representation made to these parties, nor was it made in reference to this sale. When this report was made, he owed no duty to *these purchasers*, to speak as to the condition of the bank, nor did he speak *to them*; he was not speaking for the estate of James, nor in reference to these sales, nor had that estate any connection with the report, nor can it be held liable for the false statements contained therein. I therefore find that Baldwin made no false representations to the purchasers respecting these shares, or in connection with the sales thereof. But, at the time of these sales, he was guilty of fraudulently concealing from them the facts then known to him as executor, as, under the same circumstances and obligations, I have above stated in respect to the sale to Wolters, and that fraud vitiates the sales to them.

If the view be taken that these executors were merely agents of the estate of James, the result would be the same. They were certainly *joint* agents, and notice to, or the knowledge of Baldwin, acquired in the course of such joint agency, was as

Keen v. James.

effectual as notice to, and the knowledge of all the defendants. *Wade on Notice* § 681.

Or, if the more restricted view be taken, that in the matter of these sales Baldwin was acting as sole agent, yet it is clear that as against his principal, his *suggestio falsi* and *suppressio veri* in the sale to Wolters, and his *suppressio veri* in the several sales to Mr. Keen, Mr. Van Fleet and Mrs. Keen, gave to each of those purchasers the right to rescind the sale. *Kennedy v. McKay*, 14 Vr. 288, 290. And this right they have lawfully exercised.

At the time of the filing of the several bills of complaint, the several complainants were, and they are now, entitled to be repaid by the defendants the several sums of purchase-money paid by each, with interest from the date of the respective payments. Each complainant was also to be indemnified against the respective assessments made by the comptroller of the currency in respect to said shares.

Pending the suits, each of the several complainants has been lawfully compelled to pay an assessment in respect to the shares purchased by him, which was an equitable burden upon the estate of James—and there is no evidence before me that the proposal made by the directors was accepted by any of the shareholders, depositors or creditors of the Mechanics' Bank of Newark. The facts that such proposal was made, of the signing of one stipulation, and of the refusal of the defendants to sign the other, were produced in evidence by the defendants' cross-examination of Mr. Keen, and if it was intended by the defendants to set up an equity against the complainants Wolters, Mr. Keen and Mrs. Keen, arising from their refusal to accept the proposal, it was the duty of the defendants to have proved, in addition, that their acceptance of the proposal was all that was needed to make it effectual according to its terms, and to have secured the payment of their assessments by the directors. Upon the evidence before me the three complainants were not in default. Each of the complainants is entitled to be repaid by the defendants the amount assessed upon him, together with interest thereon from the date of such assessment.

Keen v. James.

There should be a reference in each cause to a master to ascertain the amount to be paid by the defendants to each of the complainants, and in taking the account the master must allow to the defendants such moneys as have been received by each complainant for dividends upon his stock after his purchase thereof.

Messrs. C. & R. W. Parker, for appellants.

Mr. Wm. S. Gummere and *Mr. T. N. McCarter*, for respondents.

The opinion of the court was delivered by

DIXON, J.

The facts in this case proved by direct evidence are: That William James, at his death, owned one hundred shares of the capital stock of the Mechanics National Bank of Newark; that he died in January, 1881, leaving a will, in which he named his widow, Elizabeth James, George F. Tuttle and Oscar F. Baldwin as his executors, who, in February, 1881, took out letters testamentary upon his estate; that then, and for many years before, and afterwards, till its close on October 31st, 1881, Baldwin was cashier of the bank, and during a period of about ten years had been fraudulently abstracting its funds to such an extent that before the death of Mr. James the whole capital of the bank was wasted, and an assessment upon its stockholders to the par value of their stock would be required under the United States statute, for the payment of its debts; that during this period, Baldwin, as cashier, had, every two or three months, sworn to reports of the condition of the bank, made to the comptroller under U. S. Rev. Stat. § 5211, in which were willfully false statements respecting the credits due the bank, and showing in 1881 assets more than \$1,600,000 beyond what the bank really had; that these reports, as made, were published according to law in a newspaper extensively circulated in the city of Newark;

Keen v. James.

that Baldwin had also, as cashier, aided in declaring semi-annual dividends upon the bank stock, which were apparently justified by the false statements of his report, but were in fact, as he knew, wholly fictitious; that by means of these published reports and dividends, a high market value had been given to the stock, so that it sold at a premium of about eighty-five per cent.; that the complainant was a business man in Newark, and, in the ordinary course of affairs, became cognizant of these reports and dividends, and, believing them to be true and genuine, in August, 1881, offered Baldwin \$930 for ten shares of the stock (\$50 a share being par), and thereupon Baldwin sold and transferred to him, at that price, ten shares, which he had for sale, as an executor of Mr. James, and turned the price in to the estate.

An effort was made, by counsel for the appellants, to lead the court to the opinion that Baldwin had, individually, sold the stock to the complainant, and then had purchased it from himself as executor; but we think the circumstances clearly show a sale to the complainant by Baldwin as executor.

An inference which we consider reasonably drawn from these facts is, that Baldwin perceived, when the complainant made his offer, that the latter was relying on the reports and dividends before mentioned as being substantially true exponents of the financial condition of the bank. It is scarcely possible to think otherwise. A business man, about to invest in the stock of a bank, would be almost sure to recur to the dividends which the bank had been paying, and to the statements of its condition which, within common experience, are so frequently published in the current newspapers, for information as to the propriety of investing. No other means of forming a judgment as to the intrinsic value of the stock would be open to him. And if he should be influenced by the market price of the stock, in case there were one, still he would know that that only represented in the main, the public estimate of the same *data*, and so would be relying upon their substantial accuracy. If, therefore, Baldwin adverted to the topic at all, he must have believed that the complainant, in making his purchase, was trusting in the truthfulness of these bases of opinion. And so great was the disparity

Keen v. James.

between the price offered by the complainant and the real value of the stock, as Baldwin knew it, so enormous had been Baldwin's defalcations, which produced the disparity, that the deception under which the complainant was acting must have forced itself upon Baldwin's mind.

Upon these facts the question arising is, Whether the complainant, promptly claiming a rescission of the sale on November 19th, 1881, soon after he learned the real condition of the bank, had a right to rescind.

If the sale is to be regarded as having been induced by Baldwin's fraud, then the complainant's right of rescission is established by innumerable cases, and it would make no difference, with regard to this right, whether we consider Baldwin, the executor, as one of the owners of the stock, selling for himself and his joint owners, or as an agent selling for the estate which he and they represented. In either case, if the defrauded vendee can make restitution so as to put the vendors in the same condition with respect to the property sold as they were in at the time of the sale, he has the right to rescind. 1 *Benj. on Sales*, §§ 636, 674; 2 *Wms. on Exrs.* 946; 2 *Pom. Eq.* § 908 et seq.; *Kenedy v. McKay*, 14 *Vr.* 288.

Was, then, the sale, viewed from the judicial standpoint, induced by Baldwin's fraud?

There were no fraudulent representations made by Baldwin pending the negotiations, but these are not necessary to taint the contract—silence may be fraudulent.

Prof. Pomeroy, in his discriminating work on equity jurisprudence, very lucidly discusses the elements of fraud affecting contracts, and in treating of fraudulent concealments, lays down this proposition: "If either party to a transaction conceals some fact which is material, which is within his own knowledge, and which it is his duty to disclose, he is guilty of actual fraud." 2 *Pom. Eq.* § 901. This accords with the language of this court in *Conover v. Wardell*, 7 *C. E. Gr.* 492: "It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a court of equity. The case must amount to a suppression of facts which one party,

Keen v. James.

under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently, be silent."

In the present transaction, no doubt Baldwin concealed facts which were within his own knowledge, and which were very material to the interest of the complainant; the only debatable topic is whether it was the duty of the former to disclose these facts.

The author just named reduces the instances in which there exists a duty of disclosure, to three classes, the first including those where there is a previous fiduciary relation between the parties, the third including transactions which are themselves essentially fiduciary, like contracts of insurance, and the second being defined as follows: "The second class embraces those instances in which * * * it appears that either one or each of the parties, in entering into the contract or other transaction, expressly reposes a trust and confidence in the other; or else, from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this class—each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties; or they may be necessarily implied from their acts and other circumstances." 2 Pom. Eq. § 902.

Many cases might be cited illustrating this doctrine. Besides those mentioned in the note to the foregoing text, the following may be referred to: *Martin v. Morgan*, 1 Brod. & B. 289; *Bruce v. Ruler*, 2 M. & Ry. 3; *Torrey v. Buck*, 1 Gr. Ch. 366; *Barwick v. English Joint Stock Bank*, L. R. (2 Ex.) 259; *Rawdon v. Blatchford*, 1 Sandf. Ch. 344; *Durell v. Haley*, 1 Paige 492.

In *Martin v. Morgan*, 1 Brod. & B. 289, the defendants had a post-dated check, drawn by B. on the plaintiffs. Between the day it was drawn and its date they learned that B. had become insolvent, and knowing that he had no funds with the plaintiffs to meet the check, they, nevertheless, presented it, at maturity, to

Keen v. James.

the plaintiffs for payment. The plaintiffs, supposing B. to be still in good credit and expecting to receive funds from him before the close of the day, paid the check. It was held that the plaintiffs were entitled to recover from the defendants the money paid, because the latter did not disclose what they had learned of B.'s insolvency, and purposely took advantage of the plaintiff's ignorance of that fact.

In *Bruce v. Ruler*, 2 M. & Ry. 3, the defendant was a yearly tenant of the plaintiff, and wishing to quit the premises before the expiration of his term, proposed to the plaintiff another tenant whom he asked the plaintiff to accept in his stead. The defendant knew that the proposed tenant was insolvent, but did not disclose that fact to the plaintiff, and the latter accepted the new tenant. *Held*, that the defendant was guilty of a fraudulent concealment, because of which he remained answerable for the rent.

Brown v. Montgomery, 20 N. Y. 287, was a suit on a note given by the defendants to the plaintiffs for a post-dated check of F. sold by the plaintiffs to the defendants. After the giving of the check, and before its sale to the defendants, F., the drawer, failed. His failure was known to the plaintiffs when they sold the check, but they did not disclose the failure to the defendants, who bought in ignorance of it. On discovering it, the defendants offered to rescind the sale and tendered back the check, demanding their note. The court held that the plaintiffs ought to have communicated the fact of insolvency, and that they could not recover upon the note.

In *Torrey v. Buck*, 1 Gr. Ch. 366, the complainant had sold a house and lot to the defendant for \$9,000, of which \$5,100 had been paid in the stock of a corporation of which the defendant was cashier. In the negotiation the defendant had declined to express any opinion about the value of the stock. It was, in fact, worthless. On discovering this, the complainant offered to rescind, and filed his bill to set aside the conveyance on return of the consideration. The chancellor concluded that the defendant had known the stock to be valueless, and held that his

Keen v. James.

omission to inform Torrey of the fact was a *suppressio veri*, which called for the abrogation of the sale.

In *Barwick v. English Joint Stock Bank, L. R. (2 Ex.) 259*, the defendant's manager gave the plaintiff a guaranty that if the plaintiff would sell D. some oats on credit, to enable D. to carry out a government contract, D.'s check to the plaintiff for the price should be paid out of the moneys received from the government in priority to any other payment except of D.'s debt to the defendant. This debt was such that it would absorb all the money to be received. The manager did not disclose this fact, and the plaintiff made no inquiries about it. The court held that if the manager knew that the guaranty would be unavailing, and intended to procure the government funds for his bank by keeping back from the plaintiff the state of D.'s account, the concealment was fraudulent.

None of the cases which I have found, however, seems to present such marked circumstances to show that one party reposed trust and confidence in the other, as does that before us. Here, it is as if the complainant, when making his offer, had said to Baldwin: "I know what declarations you have made public touching the facts on which depends the value of this stock. Your means of information were such that it is reasonable to believe those declarations indicated the truth. I have no other available means of ascertaining the bank's condition. I believe your declarations, and therefore offer you this price for your stock." Although these words were not spoken, yet we think they express the mental processes of the buyer, before making the offer, and the suggestions of the seller's own mind on receiving the offer. They indicate the ground on which the parties were consciously dealing, and therefore they form a proper basis for determining whether or not one was reposing confidence in the other. Here, then, the seller sees that the buyer is trusting him, and must trust him, and is being deceived by falsehoods which he has himself set afloat, and that if he does not remove the deception, he or those whom he represents can make a profit out of it. Certainly, in this condition of things, the seller was under a duty of disclosure; he could not, inno-

Keen v. James.

cently, be silent; silence was equivalent, in conscience, to re-assertion. For Baldwin to strike a bargain with a buyer so deceived was palpably dishonest, a willful taking advantage of his own wrong, a fraud against which a court of equity must afford relief.

Nor is it of moment that Baldwin's fraudulent acts prior to the sale had been performed by him in his office of cashier, and not in his character as executor of Mr. James. Those acts do not constitute the fraud which vitiated the contract. That was perpetrated in the sale itself by Baldwin as executor, and consisted in bargaining with the complainant, under the circumstances mentioned, without disclosing the truth. The doctrine that notice to an agent, in order to be binding upon the principal, must come to the agent in the course of his employment, is not applicable to a case of actual fraud. The fraud of the agent affects the principal for the reason that every principal impliedly warrants the integrity of his agent, at least so far as to prevent his retaining the fruits of the fraud, and if the agent, in transacting his employer's business, has unlawfully effectuated a fraudulent design, it is unimportant whence the elements of his corrupt purpose were derived.

We think it clear, then, that the complainant was entitled to rescind the sale.

On November 16th, 1881, an assessment equal to the par value of their shares was levied on the shareholders of this bank, in order to satisfy its debts, agreeably to U. S. Rev. Stat. § 5151. By reason thereof, the complainant, as holder of the shares bought from the defendants, was compelled to pay, and in December, 1881, and January, 1882, did pay, the sum of \$503.75 to the bank's receiver. The decree below directs the defendants, as executors, to re-imburse the complainant for the money so paid, as well as for the original price received by them on the purchase. This is equitable. The rescission of the sale for fraud puts the parties in the position they would have occupied if the sale had not been made, and, in equity, the defendants must be regarded as having always been the holders of the stock. 2 *Pom. Eq.* § 915. In that capacity the estate and

Smith v. Gaines.

funds in their hands as executors would be liable to the receiver for the assessment. *U. S. Rev. Stat. § 5152*. The complainant having, by fraud chargeable upon the executors, been clothed with a character in which he was legally obliged to pay a debt that, in equity, ought to have been imposed upon them, is equitably entitled to re-imbursement from them, and a decree to that end, in this suit, is necessary as a part of that complete relief which a court of equity endeavors to afford in all causes brought within its cognizance.

The chancellor's decree should be affirmed.

In the appeals of the same appellants against Anna M. Keen and against Abraham V. Van Fleet, the same result is reached for the same reasons.

Decree unanimously affirmed.

ANDREW J. SMITH et al., complainants and respondents,

v.

MARQUIS D. L. GAINES et al., defendants and appellants.

1. Upon a bill for partition among remaindermen, the consent of the owner of the particular estate in possession is requisite, and, if a sale be ordered, it must be a sale of the whole estate, as well that in possession as that in expectancy.

2. Where a bill filed by trustees seeks the sale of real estate vested in them in trust, and they have not a present absolute power of disposition over their estate, according to the terms of the trust, their *cestuis que trust* are necessary parties to the suit.

On appeal from a decree of the chancellor, whose opinion is reported in *Smith v. Gaines*, 11 *Stew. Eq.* 65.

Mr. B. Williamson, for appellants.

Mr. H. C. Pitney, for respondents.

Smith v. Gaines.

The opinion of the court was delivered by

DIXON, J.

The complainants' case is, that they are owners in possession of a life estate in certain lands in Morris county, and are also owners in remainder of an undivided half of said lands in fee, and that the defendants are owners in remainder of the other undivided half; and they pray a partition of the estate in remainder, or if that be deemed impracticable, as they aver it to be, then they pray a sale of the estate in remainder. The chancellor decreed such a sale, leaving the life estate of the complainants undisturbed.

From this decree the defendants appeal, insisting (*inter alia*) that the chancellor has no authority to order the sale of estates in remainder without selling also the particular estate in possession, and that for the sale of the particular estate the consent of the owners thereof is requisite.

Independently of statutes, a suit for partition could not be maintained by one whose undivided estate was in the reversion or remainder only. *In re Burroughs* (Stevens v. Enders), 1 Gr. 284; *Young v. Rathbone*, 1 C. E. Gr. 224; *Evans v. Bagshaw*, L. R. (8 Eq.) 469, L. R. (5 Ch.) 340. Nor could the court in any case decree a sale of the common property against the will of any owner *sui juris* (2 L. C. in Eq. 889); the most that could be done was, to make the unequal division of the land, and balance the shares by a pecuniary recompense for owelty of partition to those who took the smaller portions of land. *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Bentley v. Long Dock Co.*, 1 McCart. 480.

The complainants' case, therefore, whether for partition or sale of the remainder, must stand, if at all, upon statutory law.

There are three statutes to be considered: "An act to authorize the partitions of lands in cases where particular undivided shares therein are limited over," approved March 6th, 1852, (*P. L. of 1852 p. 157*); a supplement thereto approved March 13th, 1861 (*P. L. of 1861 p. 318*); and a supplement to "An act for the more easy partition of lands held by coparceners,

Smith v. Gaines.

joint tenants and tenants in common," approved March 18th, 1858 (*P. L. of 1858 p. 478*). So far as these statutes are now in force, they are contained in sections 25-30, inclusive, of the Partition Act in the *Rev. p. 801*.

The act of 1852 provides that—

"Partition of lands, held by coparceners, joint tenants or tenants in common, may be made by any court or jurisdiction having authority to make partition of lands, on any proceeding authorized for that purpose, notwithstanding the share held by any coparcener, joint tenant, or tenant in common, may be for a less estate than a fee, or may be limited over after an estate for life or any estate therein; and such partition shall bind all tenants of such share, in remainder, reversion or expectancy, who shall be entitled only to that part of the lands partitioned as may be set-off in severalty to the share upon which such remainder or expectancy is limited; provided, that in all cases where such remainder, reversion or expectancy is limited over to any person in being, such person shall be served with the like notice or process as may be by law required to be served on the owner or tenant of such share in such proceeding of partition, if notice be required therein; and in all such cases where partition is made of lands of which any share is limited over, and which are held in equal undivided shares, the commissioners, or other persons making partition, shall divide said lands and allot the shares, and certify such division and allotment in the manner directed by the partition act." *Rev. p. 801 § 25*.

This statute applies to those cases, only, where the estate of the coparceners, joint tenants or tenants in common is in possession. This appears from the use of language identical with that in the previous partition acts, "lands *held* by coparceners, joint tenants or tenants in common," which had always, since Henry VIII., been construed in those acts as denoting present possession, either actual or constructive. *Stevens v. Enders, 1 Gr. 271*.

The same idea is further indicated in the subsequent clauses of the section; that which gives to the remainderman &c. the portion of land set off in severalty to the share upon which the remainder &c. is limited, plainly implying that the land is owned in shares, anterior to the remainder or expectancy; that which requires to be given to any remainderman &c. in being, such notice as the owner or tenant of the share is entitled to in the proceeding, directly pointing to the fact that a tenant in possession of a share is a party to the proceedings; and the last clause of the section, speaking of the shares as being both *held* and *limited*

Smith v. Gaines.

over. The design of the statute seems to have been, not to enlarge the class of cases in which the courts could make partition, but to render the partition binding upon those who were entitled to the shares in expectancy, as well as upon the tenants in possession.

The supplement to this act, passed in 1861 (*Rev. p. 802* §§ 26, 27, 28, 29), authorizes a sale to be made in all "proceedings for the partition of lands, where all or any of the undivided shares thereof is or are limited over in the manner specified in" the foregoing section of the act of 1852. It cannot, therefore, sanction the sale of estates not embraced within the purview of that statute, such as those where the tenant in possession owns an entire estate. Moreover, the supplement directs a sale of the title of all the tenants, whether in possession, remainder, reversion or expectancy, and for this reason, also, it cannot be vouched to support the present decree.

The statute of 1858 (*Rev. p. 802* § 30) enacts—

"That where there is an estate for life or lives, or other less estate, in any lands or tenements situate in this state, and the reversion or remainder in fee is owned by several persons, as joint tenants, coparceners or tenants in common, and the particular tenant or tenants shall consent thereto, partition of the said lands or tenements may be made among said joint tenants, coparceners or tenants in common, by any court or jurisdiction having authority to make partition of lands; * * * and in case partition cannot be made of such lands or tenements, or any part thereof, without great prejudice to the said joint tenants, coparceners or tenants in common, so that a sale thereof shall be ordered, the whole estate, in possession as well as in expectancy, in the said lands or tenements, or in the said part thereof which cannot be divided, shall be sold, and such portion of the proceeds of said sale shall be paid to the particular tenant or tenants as shall be just and reasonable, according to the quantity of his, her or their estate and interest in said lands or tenements, and as shall be ascertained by the court ordering such partition or sale."

This was the first, and is as yet the only legislation which authorizes a joint tenant, coparcener or tenant in common of a remainder or reversion to apply for partition of the lands in which he owns an undivided interest. According to its terms, three things must concur to justify the proceeding: first, the particular estate must be for life or less; second, the remainder or re-

Smith v. Gaines.

version must be owned in fee; and third, the particular tenant or tenants must consent to the proceedings. On these conditions partition may be made among the joint owners, or if that be impracticable without great prejudice to their interests, a sale of the whole estate, embracing that in possession as well as that in expectancy, may be ordered.

The present decree cannot rest upon this statute. The consent of the particular tenants is wanting, and even if it were obtained, a sale of the remainder only could not be justified. The remaindermen are not obliged to take the risks attending a sale of their uncertain interests; they are entitled to a sale of the entire estate, and a division of the proceeds on equitable principles.

This disposes of the present appeal, but as a question has been raised and discussed whether the *cestuis que trust* of the complainants are not necessary parties to the suit, and as other proceedings may be instituted for partition or sale of the land, we deem it proper to decide that question also.

It appears that the complainants are trustees for four persons of a life estate in the whole property, under the will of Andrew B. Cobb, and are trustees for three of those persons of a moiety of the remainder, under an order of the court of chancery. By the express directions of the will, the trustees have power only to lease the property during the twenty years following the testator's death, which occurred in 1873; after twenty years they have the power to sell. Under the chancery order the trustees have no power to sell the remainder at all, but only to make leases for terms not exceeding thirty years in the whole, and to improve and develop the property.

The general rule as to parties in cases of trust is that, in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* are necessary parties. *Story's Eq. Pl.* § 207. Many exceptions have been made to this rule, some for convenience, some for the reason that, by the terms of the trust, or from the nature of the suit, the trustees themselves represented the *cestuis que trust*. On this latter ground, it has been laid down that where the only object of the suit is to transfer the trust property into the hands of the trustees, the *cestuis que trust*

Smith v. Gaines.

need not be parties; but if the existence or enjoyment of it is affected by the prayer of the suit, then they should be. *Calvert on Parties* 212. Even to the rule, in this restricted form, there are numerous exceptions to be found in decided cases, nor does the subject seem capable of exact definition. Courts of equity exercise a large discretion in the matter, guided sometimes by slight circumstances, and taking care, on the one hand, that justice shall not be defeated through the impracticability of bringing in all persons interested in the issue, and, on the other hand, that the rights of individuals shall not be determined when they are neither heard nor represented. By the thirtieth general order of the English court of chancery (*Cr. & Ph.* 377), it was directed that in suits relating to real estate, vested in trustees by devise, where they are competent to sell and give discharges for the purchase-money, they should represent the persons beneficially interested in the real estate in the same manner and to the same extent as executors and administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate. But, notwithstanding this order, it was held in *Lloyd v. Smith*, 13 Sim. 457, that where a bill seeks the sale of real estate, vested in trustees by devise, and they have not a present, absolute power of disposition over it, according to the terms of the trust, they do not fully represent the *cestuis que trust*, and the latter are necessary parties.

This doctrine governs the present case. The trustees have not a present power to sell either the life estate or the remainder, nor to consent to a sale thereof, and their prayer for such a sale is an attempt to override, or at least to modify, the terms of their trust. In such an effort, of course they do not represent the *cestuis que trust*, and the latter are entitled to be heard on the question whether it shall succeed. They are, therefore, necessary parties.

I think the decree should be reversed and the bill be dismissed, unless the complainants apply to the chancellor for leave to amend in accordance with the foregoing opinion.

Decree unanimously reversed.

Freichnecht v. Meyer.

GUSINE FREICHNECHT, complainant, appellant,

v.

MAGDALENA MEYER, defendant, respondent.

1. A bill to redeem alleged that the defendant was a mortgagee in possession; that the complainant was owner of the equity of redemption and was ready to pay the mortgage debt. The answer alleged that the defendant had become the owner of the absolute title by purchasing the complainant's equity of redemption under a justice's court judgment against the complainant, docketed in the common pleas. The complainant filed a general replication. —*Held*, that the question whether the title, under the docketed judgment, was valid or void on its face, was properly put in issue.

2. On such an issue, the proper practice in chancery is to send an issue on the legal title to be tried at law, or to retain the bill until an action can be brought at law to try the legal title, or until an action pending at law for that purpose can be determined; and the court of equity can so control the action at law that the legal question may be decided. If the parties waive a trial at law, the court of equity is at liberty to decide the question for itself.

3. *Tusto v. Kipping*, 14 Vr. 448, re-affirmed.

4. When parties have acted under a mutual mistake of law, and the party jeopardized thereby can be relieved without substantial injustice to the other side, equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him.

5. A mortgagee, having recovered in a court for the trial of small causes a judgment against the mortgagor for a debt other than the mortgage debt, docketed the judgment in the common pleas, and at a sheriff's sale under execution from the pleas bid in the mortgaged premises, believing that she was purchasing a good title thereby. The mortgagor, believing that the mortgagee had thereby secured an absolute title, surrendered possession to her, and thereafter the mortgagee, with the knowledge of and without objection from the mortgagor, used the property as her own, and placed substantial and permanent improvements thereon. Subsequently, the mortgagor discovered that the constable's return to the execution from the trial court was so defective as to render the docketing and sheriff's sale illegal and void, and thereupon filed a bill to redeem. —*Held*, that she must pay the mortgagee the value of the improvements.

On appeal from a decree of the chancellor, whose opinion is reported in *Freiknecht v. Meyer*, 11 Stew. Eq. 315.

Freichnecht v. Meyer.

Messrs. E. D. & W. B. Gillmore, for appellant.

Mr. Joseph A. McCreery, for respondent.

The opinion of the court was delivered by

DIXON, J. The complainant filed her bill to redeem a lot of land in Jersey City from two mortgages, dated respectively February 6th, 1869, and April 2d, 1872, given by herself and husband to the defendant, to secure \$400. The bill avers that about March 7th, 1878, the defendant took possession of the mortgaged premises as mortgagee, and still holds the same, and prays that an account may be taken and allowance made to the complainant of the rents and rental value of the property, and that, if any balance shall appear to be due the defendant on her mortgages, she may be decreed to surrender the mortgaged premises to the complainant on payment of such balance, which the latter tenders herself ready to pay.

The defendant's answer admits the mortgages and the entry into possession about March 7th, 1878, but alleges that the defendant

"Entered into and has since remained in possession of said mortgaged premises, as stated in the bill, but not simply as mortgagee thereof, but also as owner by purchase of the equity of redemption which the complainant theretofore had in said premises."

The answer then sets forth the means by which the defendant claimed to have become the owner, viz., a judgment in her favor against the complainant, obtained in a court for the trial of small causes, for a debt outside of the mortgage debts; the docketing of that judgment, in due form of law, in the common pleas of Hudson county; a *fi. fa.* from the common pleas, and a sale and conveyance of the premises by the sheriff of Hudson county to the defendant. The answer further avers that the complainant acquiesced in said conveyance, and thereupon voluntarily surrendered the possession of the premises to the defendant, who entered, paid off taxes, water-rents and assessments, and some time afterwards made valuable improvements upon the property.

Freichnecht v. Meyer.

The complainant filed a general replication.

About the time the bill was exhibited, the complainant brought an action of ejectment for the premises against the defendant, in the Hudson county circuit, to which the defendant pleaded the general issue, and, on particulars of her title being demanded, set up the mortgages and the sheriff's deed, with the proceedings whereon it rested. Thereupon the complainant applied to the chancellor for an order that the ejectment suit should stand as an issue from chancery to try the title under the sheriff's deed presented by the answer, and that the defendant should be restrained from relying thereon upon the mortgage, so that it might be ascertained at law whether the complainant was still the owner of the equity of redemption. The defendant opposing this application, it was denied.

Proofs were then taken in the cause, which established the facts alleged in the pleadings, except that they also developed the matter upon which the complainant relied to show that the defendant's title under the sheriff's deed was, on its face, illegal and void.

At final hearing, the chancellor dismissed the bill on the ground that it was silent as to the sheriff's deed, and stated that the defendant took possession as mortgagee, when in fact she entered as owner of the equity of redemption, and held under both the sheriff's deed and the mortgages. He declined to pass upon the validity of that deed, because the bill raised no issue thereon, and said that if it had raised such an issue, the court would have had no jurisdiction over it, it being a purely legal question.

From this dismissal the complainant appeals.

The first question arising touches the sufficiency of the bill.

The most important part of a bill in equity is that denominated the "stating-part," in which should be set forth all the facts fundamentally material to the complainant's case, actually essential to it as a portion of its very consistency, and none others. *Farren's Bill in Chancery* pp. 15, 30. Formerly the bill contained very little more than the stating-part. *Partridge v. Haycraft*, 11 Ves. 570. And if the defendant, by plea or answer,

Freichnecht v. Meyer.

introduced new matter, which made it necessary for the plaintiff to put in issue some additional fact on his part in avoidance of the new matter, that was done by a special replication. *Story's Eq. Pl.* § 878. A general replication would only deny the truth of the new matter. *Lovett v. Demarest*, 1 Hal. Ch. 113. But special replications having now gone out of use, there have been substituted in their room either amendments of the bill, or what is styled the charging-part of the bill. This latter usually consists of some allegations that set forth the matters of defence or excuse which it is supposed the defendant intends or pretends to allege in justification of his non-compliance with the plaintiff's right or claim; and then charges other matters which disprove or avoid the supposed excuse or defence. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit. *Story's Eq. Pl.* § 31; *Mitford's Ch. Pl.* 50. The charging-part of the bill is, however, often omitted, and does not seem indispensable in any case. *Story's Eq. Pl.* § 33; 1 Dan. Ch. Pr. 376.

It thus appears that if the complainant has averred, in the bill, all the facts necessary to constitute his right to the relief sought, and intends to rely upon a mere denial of the matters which the defendant may assert to defeat his claim, he can safely dispense with the charging-part of the bill and the special replication. The stating-part of the bill and the general replication will put in issue everything essential to his relief.

This was the complainant's position in the present case. The bill averred that she was the owner of the equity of redemption; that the defendant was a mortgagee in possession, and that the complainant was ready to pay her debt, in redemption of her land. This constituted her complete title to relief. She knew, indeed, that the defendant would deny her ownership of the equity of redemption, and would set up a conveyance to herself of the absolute estate, but the complainant sought no discovery, and no equitable assistance against that conveyance, and trusted to nothing but its inherent and manifest defects to show its invalidity. Under these circumstances, her bill and general repli-

Freichnecht v. Meyer.

cation were sufficient to present all the issues necessary to be determined.

The next question is, What course was proper to be pursued respecting the claim which the defendant set up in bar of the complainant's equity of redemption? This claim was that the complainant's estate, regarded as an equitable interest only in its relation to the mortgage, but as a legal estate for all other purposes, had been conveyed to the defendant by proceedings at law. It presented a question of legal title.

The general rule is that a court of equity has no jurisdiction to try or establish, by its decree, the legal title to lands. *Am. Dock and Imp. Co. v. Trustees*, 10 *Stew. Eq.* 266. When, therefore, the existence of such a title is put in issue in an equity cause, various modes of dealing with it have been adopted. Sometimes, when the complainant's right to the relief sought depended upon his having the legal title, and there was no obstacle to his assertion of that title in an action at law, the court of chancery has dismissed his bill because it was filed before he had so asserted and maintained his title. This has been done with bills of peace, and bills for partition, and in other cases. The modern practice, however, leans much more toward the retention of the bill (except in some sorts of bills of peace), until an opportunity is afforded to the complainant to bring a legal action upon his title, or until an issue out of chancery can be tried at law. *Hartshorne v. Hartshorne*, 1 *Gr. Ch.* 349; 2 *Lead. Cas. in Eq.* 880 (*Agar v. Fairfax*). This practice seems to be necessary when the complainant relies upon an equity only, and the defendant sets up a legal right in defence. It is also usual, when an action at law is to be brought, for the court of chancery to control the action in such a manner that the issue to be tried shall be that on which the chancellor desires an adjudication at law. Thus in *Thornton v. Court*, 3 *De G., M. & G.* 293, where the defendant held a mortgage, by which he could prevent a trial at law of the issue which it was designed to have settled, the equity court made an order restraining the defendant from using the mortgage for that purpose. A similar power was exercised in *Decker v. Caskey*, *Sax.* 427. If an action at

Freichnecht v. Meyer.

law be already pending, wherein the question involved may be decided, the chancellor adopts the obvious cause of controlling that suit to reach his ends. *Swanger v. Gardner*, 3 De G. & S. 696. These cases indicate the proper procedure in the present instance. The complainant claimed against the defendant an equitable right remaining out of her former legal estate. She admitted that the defendant, as mortgagee, held a legal title consistent with her own equitable interest. The defendant set up a different legal title subversive of the complainant's equity. The complainant claimed no equity against such an estate, but simply denied its existence. The complainant having instituted an action of ejectment, in which, if the mortgages were kept out of view, the existence of that estate could be determined, and having asked the chancellor to control that cause so as to try the question, we think the petition should have been granted. No complaint is made, or appears possible, against the fairness of such a course. To dismiss the bill for want of jurisdiction, either to try or have tried the legal title, rendered the complainant's equity, however well founded, wholly unavailable. In chancery, she was confronted by the sheriff's sale; at law, by the mortgages. The procedure which her petition sought was the only method of redress open to her, except that which this court will now adopt in its stead.

When, at the defendant's instance, a trial at law was refused, the defendant could not complain if the chancellor had, himself, decided the question. Cases need not be cited to indicate the rule that when a matter proper for the determination of a court of law arises in an equity cause, the chancellor may, by consent of parties, himself pass upon it, since the practice was so recently followed by us in *Palys v. Jewett*, 5 Stew. Eq. 302, a case standing on the very verge of the rule. This brings us, then, to a consideration of the point in issue—the validity of the sheriff's sale.

As already stated, that sale was made under an execution from the court of common pleas upon the docketing there of a judgment rendered in a court for the trial of small causes. In *Tasto v. Klopping*, 14 Vr. 448, it was decided that a condition precedent

Freichnecht v. Meyer.

to the lawful docketing of such a judgment was a constable's return, upon an execution out of the trial court, to the effect that he could not find *any* personal property of the defendant whereon to levy, or that he had levied and sold the goods and chattels found and had made thereof part of the judgment, and that the same was not fully satisfied, and stating the balance still unsatisfied. It was also decided that a constable's return, to the effect that he could not find property enough to pay the *entire amount* of the execution, was not a compliance with this condition, and that such non-compliance would defeat a title based upon the execution from the common pleas. This decision is applicable here. In the proceeding on which the defendant relies the constable's return was :

"I return the within execution this August 16th, 1876, unsatisfied. I could not find sufficient goods and chattels belonging to said defendants, in this county, whereon to levy and pay the demand according to law."

This means that he could not find enough property to satisfy the whole judgment, and not that he could not find any, or had sold what he could find and a balance still remained. It is substantially the same as was condemned in the case just cited. The defendant's title under the sheriff's deed must therefore be adjudged bad, and it follows that the complainant still has an equity of redemption.

The case, however, presents circumstances which require the court to impose on the complainant certain conditions precedent to the exercise of her right to redeem, viz., the payment to the defendant of a fair compensation for the permanent improvements she has made. It appears that, before the sheriff's sale, both complainant and defendant believed that such sale would be valid, and some negotiations passed between them on that assumption, from which the defendant not unreasonably inferred that the complainant was willing she should take the property in satisfaction of her judgment, if no one else would bid more ; that after the sale, both parties believing it to have been legal, the complainant surrendered and the defendant took and retained possession of the premises, and thereafter the defendant treated

Freichnecht v. Meyer.

them as her own, making lasting improvements which greatly increased their value; that the complainant knew of these improvements and believed that the defendant was acting upon the idea that she was owner, yet never questioned her title nor objected to her conduct until this bill was filed. Now, without undertaking to say that these facts would give the defendant a right to affirmative relief, we think it plain that they present a case for the application to the complainant of the maxim that they who seek equity must do equity. There would be a manifest inequity in the complainant's appropriating the benefit of the defendant's expenditures without compensation. Such an appropriation would be contrary to the expectation of both parties when the outlays were made. Against it the defendant has a perfect shield at law in her estate as mortgagee, and this court should not deprive her of that shield except upon terms which are just.

The complainant urges that the question whether the defendant's title was good or bad depended upon the sufficiency or insufficiency of the constable's written return to his execution, and hence was a question of law, the correct solution of which the defendant was bound to know; that therefore the defendant is chargeable with knowledge that she had no title except under her mortgages, and so must be held to have made the improvements as mortgagee; and that a mortgagee is not entitled to re-imbursement beyond necessary repairs.

No doubt the general rule, both at law and equity, is "*ignorantia juris haud excusat*," as the courts of this state have repeatedly declared. *Garwood v. Eldridge*, 1 Gr. Ch. 145; *Bentley v. Whittemore*, 3 C. E. Gr. 366; *Hampton v. Nicholson*, 8 C. E. Gr. 423; *Hayes v. Stiger*, 2 Stew. Eq. 196. The rule, however, has not been considered universal and inflexible. Thus in *Champlin v. Laytin*, 6 Paige 189, 195, Vice-Chancellor M'Coun said: "As a general rule, this court does not relieve upon the ground of a mistake in matters of law, because every man is presumed to have a knowledge of the law. * * * Yet there are cases in which this court will interfere upon the ground of such mistake. * * * As, for instance, * * * if both parties

Freichnecht v. Meyer.

should be ignorant of a matter of law, and should enter into a contract for a particular object, and the result according to law should be different from what they mutually intended, there, on account of the surprise or immediate result of the mistake of both, there can be no reason why the court should not interfere to prevent the enforcement of the contract and to relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious and inequitable advantage of the other, and to derive a benefit from a contract which neither of them ever intended it should produce." On this principle he based his decree. On appeal (*Id.* 202), Chancellor Walworth, affirming the decree for other reasons, refrained from expressing any opinion one way or the other upon the point of decision below, which he said presented great difficulties on both sides. In the court of errors (18 Wend. 407), notwithstanding Justice Bronson's elaborate and forcible presentation of the opposite view, Senator Paige stated his concurrence in the principle laid down by the vice-chancellor. So, in England, Sir John Leach, V. C., in *Naylor v. Winch*, 1 S. & S. 555, said: "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake;" and in *Clifton v. Cockburn*, 3 M. & K. 76, Lord Brougham said: "I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law." Likewise in *Stone v. Godfrey*, 5 De G., M. & G. 76, Lord Justice Turner stated that he had no doubt the court had power to relieve against mistakes in law as well as against mistakes in fact. Similar *dicta* by all the justices appear in *Rogers v. Ingham*, L. R. (3 Ch. D.) 351. See, also, *Stupilton v. Stupilton*, 2 L. C. in Eq. 1675. In the recent case of *Cooper v. Phibbs*, 17 Ir. Ch. Rep. 73, the lord chancellor of Ireland said: "No doubt a mistake in point of law may be corrected both in this court and in a court of law. This is now perhaps sufficiently established, though it was for some time a subject of con-

Freichnecht v. Meyer.

troversy in courts of law;" and finally when the case reached the house of lords (*L. R.*, 2 *H. L.* 149), Lord Westbury used this language: "It is said '*ignorantia juris haud excusat*;' but in that maxim the word '*jus*' is used in the sense of denoting general law—the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." To the same effect is the language of Lord Chelmsford, in *Earl Beauchamp v. Winn*, *L. R.* (6 *H. L.*) 223, 234, concurred in also by the other lords.

These citations (and others of similar purport might be adduced) sufficiently indicate that in a court of equity, at least, a man is not, under all circumstances, to be regarded as fully comprehending all his legal rights and duties, so far as they grow out of facts which he knew, or with reasonable diligence might have learned. Indeed, one large branch of equity jurisprudence, the reformation of written instruments, appears to rest mainly upon an exception to such a doctrine; for if parties acquainted with the tenor of documents which they execute are to be conclusively presumed to know also their legal import, it would seem that there could be no room for the notion that the writings did not express their real intention. But constantly courts of equity reform the most solemn instruments upon the ground, not that the parties have inserted words which they meant to exclude, or omitted words which they meant to insert, but that the language does not express their agreement; that they did not put upon the terms employed the same construction as the law does; in short, that there was a mutual mistake of law, using the word 'law' in its broader sense. *Weller v. Rolason*, 2 *C. E. Gr.* 13; *Green v. M. & E. R. R. Co.*, 1 *Beas.* 165, 2 *McCart.* 469; *Wanner v. Sisson*, 2 *Stew. Eq.* 141; *Stines v. Hayes*, 9 *Stew. Eq.* 364, 11 *Stew. Eq.* 654.

In this state of the decisions and *dicta*, it would be scarcely

Freichnecht v. Meyer.

prudent to attempt to lay down a very comprehensive rule for the relief in equity against mistakes of law. I am not prepared to agree with Lord Westbury that in all cases the ownership of property is to be classed among matters of fact, or that in the maxim "*ignorantia juris haud excusat jus*" denotes only general law, the ordinary law of the country, as distinct from the legal interpretation of private instruments. But I think it will be found to accord with the decisions, and with the safe and equitable conduct of affairs, to establish this rule: that whenever the mistake of law is mutual, and the party jeopardized thereby can be relieved without substantial injustice to the other side, there equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him.

In *Haggerty v. McCanna*, 10 C. E. Gr. 48, Chancellor Zabriskie felt the hardship of refusing assistance to a complainant who had spent his money in improving an infant's lands under the belief that they belonged to his wife, although his mistake was one of general law, and could not be said to have been shared in by the defendant, an infant; nevertheless, the chancellor intimated that relief would have been afforded if the defendant, instead of the complainant, had been an applicant for the exercise of equitable power. In *Putnam v. Ritchie*, 6 Paige 390, which was like *Haggerty v. McCanna*, Chancellor Walworth, while refusing compensation to the complainant, said that his claim rested upon a principle of natural equity which was fully adopted in the civil law, and which, in his own court, was constantly acted upon where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another who was obliged to resort to the court of equity for relief; the court, he says, in such cases acts upon the principle that the party who comes as a complainant to ask equity must himself be willing to do what is equitable.

The case of *Cooper v. Phibbs*, *ubi supra*, completely sustains the rule above enunciated. There, the father of the defendants had been entitled to an estate for life only in a fishery, but had supposed himself to be the absolute owner, and under that belief

Freichnecht v. Meyer.

had laid out large sums of money in extending and improving it. On his death, his heirs, the defendants, thought they had become its owners, and with that opinion they made a lease for years to the complainant, who had always entertained the same view of the title. In truth, on the death of the defendants' father, the title had vested in the complainant for life by force of a trust agreement, the existence of which was known to all the parties, and the contents of which they knew or could readily have learned, but which had been misconstrued. The complainant, on coming to a recognition of his rights, filed a bill to set aside the lease. The house of lords acceded to his prayer, but upon the terms that the expenditures of the former tenant for life, in the permanent improvement of the fishery, should be repaid to his representatives. *Vanderhaise v. Hugues*, 2 *Beas.* 410, seems to be of similar character. The defendant was, in fact, mortgagee in possession under a conveyance from the complainant absolute on its face. From the circumstances mentioned in the chancellor's opinion, it is to be inferred that the defendant had been considered by both himself and the complainant to be the absolute owner, and as such had made lasting improvements on the property. Chancellor Green decreed, on the complainant's bill to redeem, that the defendant must be allowed for those improvements.

The case before us stands upon the same footing, and the complainant should be permitted to exercise her right of redemption only on condition that she pay to the defendant the present value of the permanent improvements which she has made on the premises.

Therefore, let the decree of the chancellor be reversed; let an account be taken of the amount due the defendant for principal and interest on her mortgage, and in this account the mortgage must be regarded as not usurious, for, besides the insufficiency of the averments of the bill touching usury, we think the evidence does not prove the charge. To this amount let the taxes, water-rents and assessments, and the cost of necessary repairs paid by the defendant, with interest thereon, be added, so far as the same were not increased by the lasting improvements.

Ludlum v. Buckingham.

From this total must be deducted what rents the defendant received, or without willful default (*Seton on Decrees, Heard's Ed. 487; Vanderhaise v. Hugues, ubi supra*), might have received from the property in its unimproved condition, and a proper charge for the occupancy thereof by the defendant herself. The balance will be the price at which the complainant has the right to redeem. But let the value of the defendant's improvements also be ascertained, and the payment of such value to the defendant be decreed to be a condition precedent to the complainant's exercise of her right of redemption.

The defendant urges, also, that she should have a decree for payment of the sum which she bid at the sheriff's sale, being the amount of her docketed judgment. But we think this should not be accorded to her, for the reason that the docketing proceedings being wholly void, the judgment remains in the trial court unsatisfied and in full legal effect; her hold upon that judgment has not been impaired.

She also insists that her mortgagee, Harper, is a necessary party to the suit, and that, as the complainant has not brought him in, no decree for redemption can be made. The case, however, does not disclose whether his mortgage was on record at the filing of the bill, so as to entitle him to be joined. *Rev. p. 118 § 78.* If it was, the complainant must amend.

Let the record be remitted, and a decree be made in accordance with the foregoing views.

Decree unanimously reversed.

JAMES LUDLUM, appellant,

v.

ALICE BUCKINGHAM and husband, respondents.

A firm owning, as partnership property, real estate, was dissolved by the death of one of the two partners. The settlement of the partnership affairs was proceeding in the court of chancery in a suit pending between the sur-

Ludlum v. Buckingham.

viving partner and the executrix of the deceased partner, who had, by his will, acquired his interest. Under such circumstances, the parties entered into a written contract for the sale of all the real estate to the executrix, who was to pay for it by procuring releases of some mortgages which encumbered it, and by also depositing in court \$30,000, to be disposed of in the settlement. The executrix failed to perform her part of the contract, and the mortgages having been foreclosed, a sale under a decree of foreclosure divested the interest of the parties and rendered specific performance of the contract impossible. The surviving partner filed a supplemental bill by leave of court, praying that the losses sustained by the partnership estate by the breach of the contract, should be ascertained and decreed to be paid or accounted for by the executrix.—*Held*,

(1) Whether the relief asked is, under such circumstances, within the jurisdiction of a court of equity, not decided.

(2) If the court has jurisdiction, the relief should be granted under the same rules which are applicable to the granting of relief by way of specific performance, and if he who seeks relief was unable to perform the contract on his part, or his conduct in the transaction was wanting in fairness and equity, the relief should be denied.

(3) In this case the contract could not have been performed by the surviving partner, according to its terms, and his conduct respecting it was so inequitable as to justify the refusal of the relief he sought.

Mr. T. N. McCarter, for appellant.

Mr. J. M. Buckingham and *Mr. F. W. Stevens*, for respondents.

The opinion of the court was delivered by

MAGIE, J.

This appeal is from a decree dismissing a supplemental bill filed by James Ludlum against Alice and John M. Buckingham, in an original suit, in which the latter parties were complainants and Ludlum was defendant. The details of the litigation and the facts developed in the phase of it now before us, are so fully stated in the opinion of Vice-Chancellor Van Fleet (on whose advice the bill was dismissed) that they need not be repeated, except so far as may be necessary to explain the conclusions I have reached. The opinion appears in 8 *Stew. Eq.* 71.

It is sufficient now to state the following facts: The supple-

Ludlum v. Buckingham.

mental bill was founded on a written contract between the parties for the purchase and sale of real estate, which was part of the partnership assets of the firm of James Horner & Co. The firm had been dissolved by Horner's death. Ludlum was surviving partner, and had an interest in the real estate. Mrs. Buckingham had an interest in it under the will of Horner. By the contract, the firm's interest in the real estate was to be sold. The contract price was to be paid by procuring releases of mortgages encumbering the same and depositing in the court of chancery \$30,000, to be subject to the orders of that court in the settlement of the partnership affairs, which was the object of the original suit between the parties.

The bill disclosed the fact that, when it was filed, some of the mortgages had been foreclosed and the real estate in question had been sold, so that the interest of the parties had been divested and a specific performance rendered impossible. But on allegations that respondents had failed to perform the contract, the bill prayed a decree against them to the effect that they had broken the contract and owed to the partnership estate such sum as would make good the losses sustained by it by reason of their failure, which sum it asked should be ascertained and decreed to be paid or accounted for by respondents.

A prominent question presented by the pleadings and discussed by counsel, relates to the jurisdiction of a court of equity to give this relief. It was contended that the bill seeks damages, not as ancillary to other appropriate and possible equitable relief, but as substantive relief which might be attained at law. On the other hand, it is insisted that the circumstances show that complete relief could not be afforded at law and justify a resort to equity. It is unnecessary to determine this important question, because, on the merits of the case, the conclusion reached in the court below was correct.

In the first place, the contract sought to be enforced by Ludlum is one which, in my opinion, he was unable to perform on his part in a most material particular. It was for the sale and conveyance of real estate, and enumerated, among other things, the "water power and water rights" connected with the real

Ludlum v. Buckingham.

estate, designating all as those theretofore owned and enjoyed by James Horner & Co.

It is shown that the value of the property depends very largely on the water power. As enjoyed by the firm, the water power was derived from water stored in a reservoir, covering several hundred acres. Thirty-six of those acres so used by the firm were not owned by it. They were held under a lease from the owners, the heirs of Cornelius Schuyler, which terminated on June 1st, 1876, but permitted the firm to become the owners in fee, by paying a price therein specified. The use of those acres was essential to the existence of the water power. Without that use, it was practically valueless.

The contract was to be performed in July, 1875. At that time Ludlum could not give such title for the water power as this contract required. For the Schuyler land (which was the key to the whole) he could only give a term of years soon to expire, with a right to acquire a fee by paying for it.

It is urged, however, that respondents knew of the situation of the title to the water power, and that, under such circumstances, the contract must be taken to stipulate for a conveyance of only such rights as the firm of James Horner & Co. had. But, notwithstanding some contradiction in the proofs, I am satisfied respondents were ignorant, when this contract was made, of the situation of the title in this respect.

But next, if the contract were capable of such a construction, I still think Ludlum ought not to be permitted to enforce it, as he seeks to do.

Relief by specific performance of contracts is granted by courts of equity in the exercise of a discretion founded on equitable principles. He who seeks to move this court to compel performance must appear with conduct free from fraud or inequity. The same doctrine must be applied to a case like this, where—performance being impossible—the aid of this court is sought to obtain damages or compensation, which may be considered a substituted performance.

At the time the contract was entered into, Ludlum was surviving partner, and also receiver, appointed by the court of

Ludlum v. Buckingham.

chancery in this litigation. The Schuyler lease was not recorded, and was, with the other papers of the firm, in his possession. If the relation between Ludlum and Mrs. Buckingham was that of trustee and *cestui que trust*, it is clear that the parties did not treat together with equal knowledge and equal terms, and no court would sustain a contract so obtained. Whether that relation existed or not, I think the circumstances were such that good faith required him to disclose by what precarious title the water power enjoyed by the firm was held. If it be said that he supposed respondents had knowledge of the situation, it may be replied that there is evidence that in 1873 he told one of respondents that the title to the water power had been "at loose ends;" that it took trouble and money to get it "straightened up," and that there was nothing then against it but some suits not connected with the Schuyler lands. Such a statement would justify respondents in believing, as testified to, that the Schuyler title had been acquired. In that view the contract was the result of a misunderstanding, and the minds of the parties did not meet therein.

The subsequent conduct of Ludlum was also such as, in my opinion, to disentitle him to the aid of a court of equity.

His claim is for damages, and is based on the ground that by reason of the failure of respondents to perform the contract, the real estate was sold under the mortgages, and brought no more than the amount remaining due after a large amount of the personal property of the firm had been applied thereon.

After the expiration of the Schuyler lease, it was renewed in the name of the mortgagee who was foreclosing. Subsequently, the mortgagee, received some payment on account, and, as Ludlum testifies, abandoned his lease. It was then, on January 1st, 1877, renewed in the name of Mrs. Ludlum. The evidence convinces me that this renewal was obtained with the knowledge and by the procurement of Ludlum.

Whether any duty devolved on Ludlum, under these circumstances, to obtain or hold the renewal for the benefit of the property, may be questioned; but I think it clear that he could not, in fairness, use the renewal he procured to depreciate the

Ludlum v. Buckingham.

value of the property, and to enhance the damages he now seeks to recover.

When the property was sold under the foreclosure, Ludlum announced that the renewed lease would be held adversely to the purchaser. The announcement, it is true, was made in response to a question, and he was bound to make it, if true. And it does not positively appear that intending purchasers were, in fact, deterred from offering to buy. But the circumstances proved justify the belief that Ludlum procured the lease with the intent to have it held adversely to intending purchasers. This course he must have known would deter bidders, and reduce the price offered. Whether this was done in collusion with Corning, the mortgagee, and with the design of aiding him in acquiring the property at a reduced price or not, is a question which need not be determined in this case. It is sufficient that his conduct tended directly to increase the damages which he now asks should be imposed on respondents.

The learned vice-chancellor concluded that Ludlum's conduct was inequitable in that he withheld from the partnership estate a very large sum of money which was due to it from him, and which, if paid, would have enabled respondents to perform this contract. I think it quite clear that, if Ludlum had done his duty to the partnership estate by paying in what he owed, either respondents would have been enabled to purchase under the contract, or the necessity of a forced sale of the personal and real property of the estate might have been obviated, and in that event probably no loss would have followed the failure of respondents to perform the contract.

For all these reasons I think that Ludlum is not entitled to the relief he asks, and that the decree dismissing his bill should be affirmed, with costs.

Decree unanimously affirmed.

Hutchinson v. Board of Health of the City of Trenton.

MAHLON HUTCHINSON et al., appellants,

v.

THE STATE, EX REL. THE BOARD OF HEALTH OF THE
CITY OF TRENTON, respondent.

1. No power exists in the common council of Trenton, under its charter, to license an individual to lay a private sewer in public streets or to discharge filth into an open watercourse not a public sewer. One who thus uses a private sewer laid under permission of an ordinance of the council, cannot claim to be exempted from proceedings to abate or restrain a public nuisance created thereby, on the ground that such use is an act authorized to be done by public authority.

2. A board of health organized under the "Act concerning the protection of the public health, and the record of vital facts and statistics relating thereto," approved March 11th, 1880 (*P. L. of 1880 p. 206*), may file a bill in the court of chancery as relators, in the name of the state, for an injunction to restrain the continuance of any nuisance hazardous to the public health of the locality. In this respect the remedy to restrain such a nuisance, which formerly was required to be in the name and at the instance of the attorney-general, has been extended so that a proceeding in equity for an injunction may be taken by such a board.

On appeal from decree made on the advice of Vice-Chancellor Bird, whose opinion is reported in *Trenton Board of Health v. Hutchinson*, 12 Stew. Eq. 218.

Mr. W. M. Lanning and *Mr. B. Gummere*, for appellants.

Mr. James Buchanan and *Mr. G. D. W. Vroom*, for respondent.

The opinion of the court was delivered by

MAGIE, J.

The bill in this case was filed in the name of the state, on the relation of the board of health of the city of Trenton. It charged the appellants (one of whom was the owner and the other the occupant of a hotel in Trenton) with causing and maintaining a

Hutchinson v. Board of Health of the City of Trenton.

public nuisance injurious to the health of the inhabitants of that city, by discharging into Petty's run, through a pipe or sewer laid in West Hanover street, filth and offensive matter from the sinks and water-closets of the hotel. It sought an injunction against the continuance of the nuisance.

Appellants, by their answer, denied that the discharge from the hotel caused the nuisance complained of, and insisted that they had acquired a right to lay and maintain the sewer, which right was such as to bar any proceeding against them for a public nuisance. They further denied the right of relators to file this bill in the name of the state, and asked that they might have the same benefit of the objection thus raised as if they had demurred to the bill.

The cause came to hearing before Vice-Chancellor Bird, and on his advice a decree was made perpetually enjoining appellants from discharging into Petty's run, through the pipe, the filth and offensive matters from the hotel.

The proofs taken below afford, in my judgment, ample justification for the conclusion there reached that the discharge complained of was a public nuisance, hazardous to the public health.

Nor can I find any ground to dissent from the conclusion of the learned vice-chancellor, which denied to appellants the protection they claimed against proceedings to abate or enjoin the nuisance.

Their contention was (and it has also been urged in this court) that they had acquired a right to maintain this sewer and to empty the waste of the hotel into Petty's run, by the act of the public authorities of the city of Trenton, and that while exercising the right so acquired they were shielded from indictment, injunction or other proceeding founded on the ground that the permitted act caused a public nuisance.

The pipe was laid by Edmund Bartlett, then owner of the hotel. Just before it was laid, the common council of Trenton had passed an ordinance giving Bartlett power to lay a ten-inch drain-pipe or sewer from the hotel through West Hanover street to Petty's run. The ordinance provided that the pipe or sewer was to be constructed so as to prevent its becoming a nuisance,

Hutchinson v. Board of Health of the City of Trenton.

and that if it should become a nuisance or injurious or dangerous to the public, on which the opinion of the common council was to be final or conclusive, then it was to be removed by Bartlett, and if he failed to remove it, by the council at his expense.

The ordinance was accepted by Bartlett, as required by its terms, and he laid the pipe and used it, as appellants have since done, under such authority as was acquired by and under this ordinance.

At the time this ordinance passed, the common council had power to cause sewers to be constructed in any part of the city, when, in their judgment, the public good required, and to assess the cost of such sewers on property benefited. *P. L. of 1874* § 25 *pl. VIII.*, § 76 *pl. II.*

The ordinance did not expressly permit the pipe when laid to be used to carry off offensive matters. When it is understood that the point of discharge at Petty's run is in a thickly-settled part of the city, and that the run (which is a natural water-course) traverses a thickly-settled region before it empties into the Delaware, and when it is noted with what care the ordinance requires it to be constructed and used so as not to become a nuisance, some ground is afforded for the argument urged on our attention, that it was never intended to authorize its use to discharge what might reasonably be expected to create a nuisance. But I think the language used in the ordinance requires us to consider it a grant of whatever power the council could thus grant, to use the pipe in the mode sewers are ordinarily used.

In the case of *Hunt v. Lambertville*, 16 *Vr.* 279, power granted to a municipal corporation to lay public sewers at public expense, was held to include by implication a power to permit such sewers to be built at private expense. But the case differed from the case in hand. The sewer in that case, though built at private expense, was to become a public sewer. It was to be used not only by those who built it but by others. In this case the sewer was to be used only by the party building it, and was plainly to remain his private property.

Under the authority to lay sewers for the public good and at the public expense, I am unable to discover authority, by grant

Hutchinson v. Board of Health of the City of Trenton.

or license, to permit the use of the public streets for a private sewer.

It is not the case of a connection with a public sewer. Petty's run was not such a sewer, but an open, or partially open, water-course. Connections with public sewers are necessary incidents to their use, and the power to permit them to be laid is implied from the power to lay the sewers.

Nor has my examination of the Trenton charter enabled me to find any grant of power broad enough to justify a grant or license to an individual to occupy public streets with private sewers. Beside the authority to lay public sewers, there is nothing giving more extensive rights in the streets than the charter considered by Chancellor Zabriskie in *Glasby v. Morris*, 3 C. E. Gr. 72, and held not to justify a license to maintain a private sewer in a public street.

My conclusion is that there was no authority in council to pass this ordinance permitting this private sewer to be laid and its contents discharged into Petty's run.

It is urged that the court ought not to examine the authority of council to pass such an ordinance, but appellants invoke the ordinance as a protection, and it is necessary to determine its legality and sufficiency.

The conclusion thus arrived at disposes of this contention on the part of appellants, for it is only when the act which has caused a nuisance has been done by virtue of authority derived from the supreme legislative power, that the public, which has granted the authority, is estopped from pursuing the actor by remedial or primitive proceedings for the resulting public injury.

Although I put my conclusion on the ground above stated, I do not wish to be understood as implying that if council had authority to permit appellants to discharge the filth of this hotel through the public streets, the result would necessarily be favorable to them.

When exemption from proceedings as for a public nuisance is claimed, on the ground that the nuisance was the result of an act authorized by public authority, it must appear that the public injury was the necessary or probable result of the permitted

Hutchinson v. Board of Health of the City of Trenton.

act, when performed with the utmost care to prevent injurious results. *Wood on Nuisances Chap. 23*; *King v. M. & E. R. R. Co.*, 3 C. E. Gr. 397; *State v. M. & E. R. R. Co.*, 1 Dutch. 437.

Nor would I be considered as implying that if council had, under the authority actually vested in them, built a public sewer discharging in a thickly-settled part of the city and there creating a nuisance, indictments would not lie or injunctions would not issue to punish those who maintained the nuisance or to restrain its continuance. When that case arises, it will be necessary to decide whether authority to construct public sewers includes authority to create a nuisance.

The next objection made by appellants questions relator's right to file this bill in the name of the state.

When the ground on which a nuisance is attacked is the injury to the public, the ordinary and proper remedy is doubtless by bill or information on the part of the attorney-general. *Wood on Nuisances* § 811; *Attorney-General v. D. & B. B. R. Co.*, 12 C. E. Gr. 1.

Relators properly admit that their right to institute this proceeding must be derived from statute. They claim to have such right under an act entitled, "Supplement to an act entitled, 'An act relating to local boards of health,' approved March 22d, 1881," which supplement was approved March 22d, 1883. *P. L. of 1883 p. 119*. By the tenth section of this act, power is given to certain local boards of health to file a bill in equity as relators in the name of the state, for an injunction to prohibit the continuance of nuisances hazardous to public health. Relators insist that they are within the provisions of this section.

This insistent requires us to determine the *status* of relators, and incidentally to examine various acts on the subject of the protection of the public health.

By the charter of Trenton, heretofore referred to, the common council was empowered to establish a board of health, to define its powers and duties, and to provide for the protection and maintenance of the health of the city. *P. L. of 1874 p. 344* § 25 *pl. XXII*.

Hutchinson v. Board of Health of the City of Trenton.

Under this power a board of health was organized and established, and such a board was in existence in 1880.

By the "Act concerning the protection of the public health and the record of vital facts and statistics relating thereto," approved March 11th, 1880 (*P. L. of 1880 p. 206*), it was enacted that every city, borough, incorporated town, or a town governed by a commission, should have a board of health, to be organized in the manner set out in the act. By a proviso contained in the eleventh section, the act was, however, excluded from operating on boards of health then organized in any city under its charter. The act was, therefore, not operative in the city of Trenton.

The obvious intent of this legislation was to provide for a health board in every municipality; where such boards were already organized, they were left to act under their respective charters. But where no such boards existed, the act required them to be created.

The next act to be considered was entitled "An act relating to local boards of health," and was approved March 22d, 1881. *P. L. of 1881 p. 160*.

The second section of this act is expressed in language which is most unfortunately obscure and ungrammatical, but it may, in my judgment, be construed as enacting that any board of health organized in any city under the provisions of its charter may, by the order and direction of the mayor and common council of such city, be organized in accordance with the provisions of the act of 1880.

The plain intent of the section is to give authority to those cities in which the act of 1880 was not operative, to organize their boards of health in the manner prescribed by that act.

But it is insisted that, in this respect, the legislature has failed to effectuate its design, and that the act, or at least the section in question, is unconstitutional.

It is said that the title of the act does not express the object aimed at in this section. But it is sufficient if the object is, by fair intendment, included within the title. *Walker v. Union*, 4 Vr. 350; *Snipe v. Shriner*, 15 Vr. 206; *Payne v. Mahon*, 15 Vr. 213. Legislation respecting local boards of health would

Hutchinson v. Board of Health of the City of Trenton.

fairly include legislation respecting the organization of such boards.

It is further urged that this section amends the act of 1880, and so becomes obnoxious to the constitutional prohibition against revising or amending any act by reference to its title only. But, while this act incidentally extends the operation of the act of 1880, it is not amendatory legislation within the meaning of this constitutional prohibition. The section in question does not amend the act of 1880 in terms, or by implication. Its effect upon that act is not direct, but incidental, and such legislation is not prohibited. This view of this clause of the constitution has been taken in the supreme court in *Van Riper v. Parsons*, 11 Vr. 123; *Evernham v. Hulit*, 16 Vr. 53, and in *Campbell v. Board*, 16 Vr. 241. The last case has, at this term, been approved by this court.

These are the only constitutional objections to the act of 1881 which have been urged upon us. No other objections were made, or have been considered.

The act, therefore, not being objectionable on those grounds, must be considered as giving opportunity to the city of Trenton to organize its board of health in accordance with the act of 1880.

By an ordinance of the common council, approved by the mayor on July 12th, 1882, it was ordained that a board of health should be organized under the act of 1880. The ordinance repealed the ordinance establishing a board of health under the charter.

Under this ordinance relators were organized, and have since acted as the board of health of the city.

Appellants further urged that the organization is not such as the act of 1880 required.

If the board has been organized, and is in existence *de facto* under this act, I apprehend that this objection could not be considered. Their title to office could no more be contested in this proceeding than could the title of an attorney-general, acting in his office, upon an information filed by him.

But examination shows that the ordinance does provide for an

Hutchinson v. Board of Health of the City of Trenton.

organization in accordance with the act of 1880. It prescribes the number of members, and the mode of appointment, as the act requires. It directs that one city physician and one health inspector shall be members, and the act requires them to be members if there are such officers in the city. It prescribes a term of service, within the act, for all the members, except the physician and inspector. It fixes the term of those members at the term of their respective offices.* It is in this respect that the ordinance is attacked, and it is contended that these members are required, by the act of 1880, to hold office for at least three years. But this is not, in my judgment, the true meaning of that act. When it requires existing officials to be members of the board, it implies, of necessity, that they are to be members during their official term. The prescription of the act respecting the term of members of the board, is manifestly to be limited to such members as are not such *ex officio*.

Having reached the conclusion that this board was properly organized under the act of 1880, it follows that they have power to initiate this proceeding. The ninth section of the act of 1883, above referred to, provides that any board of health so organized may inquire into the existence of nuisances hazardous to public health, and the tenth section provides that any *such* board may file a bill in the court of chancery, in the name of the state, for an injunction to prohibit the continuance of such nuisances.

It was further urged that the court below erred in not receiving pertinent evidence offered to show that the discharge of the waste from this hotel through the sewer complained of, occasioned less hazard to health than any other practicable method of disposing of it, until the city of Trenton built public sewers, into which it could be discharged.

The argument was that hotels are public necessities, and as such, licensed to entertain guests; that the waste matter from every human being tended to create a nuisance; that when many were collected, the disposal of such waste was necessarily at the risk of creating a nuisance, and that a court of equity would not enjoin one method of disposal of such waste, if shown that other practicable modes were more injurious.

First National Bank of Clinton v. Cummins.

But this contention cannot prevail, and the evidence offered was rightly rejected. No business is so necessary as to justify those conducting it in creating a nuisance within the thickly-settled parts of a city. If a hotel cannot dispose of its necessarily accumulating filth without creating a nuisance, and happens to be erected in a populous city which will not or cannot provide sewers or other facilities for disposing of such filth without injury, it is plain that its business must cease in that locality until it can be conducted with due regard to public safety and comfort.

The decree below should be affirmed, with costs.

Decree unanimously affirmed.

THE FIRST NATIONAL BANK OF CLINTON, NEW JERSEY,
appellant,

v.

GEORGE O. CUMMINS et al., respondents.

When a debtor made a conveyance, fraudulent as to creditors, to his son, taking from him at the same time a mortgage to secure certain trust moneys in his hands, a court of equity, in setting aside such conveyance on a creditor's bill, will validate the mortgage in behalf of the *cestuis que trust*.

On appeal from a decree advised by Vice-Chancellor Bird, whose opinion is reported in *Clinton Bank v. Cummins*, 11 Stew. Eq. 191.

Mr. Martin Wyckoff and *Mr. Wm. H. Morrow*, for appellant.

Mr. Jos. Alward, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

This is a bill filed by a judgment creditor to set aside a conveyance made by the defendant in execution, on the ground that

First National Bank of Clinton *v.* Cummins.

such transfer of title was for the purpose of defrauding creditors. That such fraud existed, and was the motive actuating both the vendor and vendee in this case, was found as a fact by the vice-chancellor, before whom the case was tried, and such fact has not been put in question in this court, for it is not either of the persons engaged in this transaction, but it is the judgment creditor, and who was partially successful in his main pursuit in the court below, who has brought this appeal. The complaint of the appellant is, that although the conveyance made, as just mentioned by the vendor, was declared to be in fraud of creditors, a mortgage for the sum of \$2,047.46, which the vendee upon receiving the title made to the vendor on the farm transferred, was allowed to stand, and was validated by the decree. Whether this mortgage is to be sustained or not is the only question to be decided in the present appeal.

The instrument thus challenged had this origin: Johnson J. Cummins was the executor of his father's will, and a certain share of the estate was left in trust in his hands for the benefit of his sister for her life, with remainder to her children. Cummins annually paid the interest on this share to his sister, but failed to secure, in any way, the principal sum, until he became insolvent, and then conceiving the design of covering up his property, made the conveyance already mentioned to his son, receiving from him at the same time a mortgage to himself as trustee of this share of his sister and her children in her father's estate. The decree in chancery, under these circumstances, which are undisputed, validates this mortgage and puts the land conveyed, subject to that encumbrance, under the lien of the appellant's judgment.

Such a decree is conspicuously equitable. If this vendor sought to cover his property from the pursuit of his creditors, he, on the other hand, entertained the purpose to secure a trust, which it was his duty to secure, and the consequence is, if this latter purpose is to be defeated, such result must be attained not by looking to the merits and justice of the affair, but at its mere form. For if this vendor had himself made, just before the conveyance to his son, this mortgage to any person to secure the

First National Bank of Clinton v. Cummins.

trust, no one would have pretended that such mortgage would have been invalidated by subsequent transfer of the title to the land to the son; and yet, the difference between the two transactions would have consisted, essentially, in the mode of doing the thing rather than in the thing itself. Nor did the argument contending for a reversal move on any higher plane than this, for the contention was, that as the statute avoided, in favor of creditors, the deed to the son, consequently, the latter, having no title, could not convey any interest in the property. But this reasoning turns aside from the fact that the giving of this mortgage was not an act done to defraud creditors; on the contrary, it was to secure the payment of an honest and highly conscionable claim, and therefore it is not readily perceived how, when the statute declares that fraudulent conveyances shall be void in favor of creditors, such a transaction is to be deemed within the provision. So far as concerns this mortgage, the design of the vendor and vendee was not fraudulent, and to that extent the transaction was not within the mischief the statute was intended to suppress. That part of the affair that comprises the making of this encumbrance had no tendency to cover the property to the injury of creditors; all that it did was to place a lien upon it in behalf of these *cestuis que trust*. In a court of equity, the matter can be dealt with partitively, the honest branch of it can be sustained, and the covinous portion can be abolished, and this has been effected by the decree in this case. And it is to be remembered that although the statutory expression is that the species of conveyance in question shall be "utterly void," inasmuch as such act is merely affirmative of the common law, such titles are but voidable, and are not only good between the immediate parties to them, but if the title be transferred *ante litem motam*, to a *bona fide* purchaser, the proprietary right of the latter becomes unimpeachable. In *Edwards v. Mitchell*, 1 Gray 239, 242, Chief-Justice Shaw, referring to conveyances of this sort, says they transfer a possession of the property, and a title, though a defeasible title, as against creditors.

In the argument addressed to this court in behalf of the appellant, it was a point much relied on that the *cestuis que trust*,

First National Bank of Clinton v. Cummins.

in whose favor that mortgage was given, do not, as it was insisted, occupy the position of *bona fide* purchasers, on the ground that such encumbrance rested exclusively on the consideration of a past intebtedness. In this respect the decision in the case of *Mingus v. Condit*, 8 C. E. Gr. 313, was relied on, and in that case the doctrine is maintained "that a deed or mortgage to a *bona fide* purchaser or mortgagee, for which the only consideration is the payment of a previous debt," is not within the sixth section of the statute of frauds, which clause takes a certain class of purchasers out of those provisions of the act that invalidate conveyances intended to operate as a fraud upon creditors. But the doctrine of this case cannot be sustained. The rule of law by which the efficacy of the facts was gauged was wholly inapplicable. The case was made up of the facts of a deed of conveyance fraudulent as to creditors, and a subsequent mortgage to a *bona fide* creditor of such grantee at the instance of the vendor. It was not the case of a sale of the vendee in his own interest, or with a view to carry the fraud into consummation by turning the money so realized into the hands of the vendor for his private use, and thus diverting it from his antecedent creditors. The chancellor failed to notice this discrimination, and that the case before him presented the feature of an appropriation, as far as this operation of the mortgage reached, of the funds of the fraudulent debtor in the same direction that he himself would have judicially administered it if the mortgagee had invoked, in a proper method, his assistance. From this view it appears the topic thus introduced in the argument has no application to the present case. These *cestuis que trust* do not stand in the attitude of purchasers, but of creditors whose claims have been, by way of preference, secured by their debtor. No one can doubt that an embarrassed debtor may create such a preference in favor of any chosen creditor. Nor when such is the case, would it seem to me to be a matter of any importance that such creditor, thus taking a preference, was aware at the time that the vendee giving him such a lien for a debt due from his vendor, had taken his title in fraud of the creditors of such vendor. Such a transaction is not a participation in the fraud,

First National Bank of Clinton v. Cummins.

nor can it, in anywise, further it; nor has it any tendency to illegally prejudice the other creditors who are interested in the matter; so far as it extends, its effect is to undo the fraud, and to put, *pro tanto*, the property of the debtor to its legal uses. This is the view which was expressed by the court of appeals in New York, in the recent case of *Murphy v. Briggs*, 89 N. Y. 446. In all important particulars the facts in that instance were closely analogous to those constituting the present controversy. It was a case in which a debtor had conveyed his real estate in fraud of his creditors, and at his request his grantee had given a mortgage thereon to secure a debt which had existed at the time of the conveyance. The judgment set aside such conveyance at the suit of a creditor but protected and validated the mortgage. In the opinion it is stated that at the time the mortgage was delivered to the creditor, he was aware of the fraudulent title of the grantee who made the instrument to him. After deciding that the conveyance was fraudulent and voidable by creditors, the court said but "the mortgage was merely applying the property for the benefit of creditors, which was a rescinding of the fraudulent contract, and entering into a new contract for its sale or transfer, which, if made in good faith, will not be contaminated by the fraud of the first contract."

In the present case the claim of the appellants is most unconscionable. What they ask is to take that trust fund from these *cestuis que trust* and misapply it, in the guise of a breach of trust, to the personal debts of the trustee. Such a prayer could be granted by a court of equity only from the pressure of legal rules that was entirely irresistible, and such not being the present posture of affairs, the decree appealed from must be in all things affirmed.

Decree unanimously affirmed.

Chancellor v. Gummere.

THE CHANCELLOR, appellant,

v.

BARKER GUMMERE, administrator of Frederick Kingman, deceased, respondent.

By the terms of a foreclosure sale the purchaser was required to pay ten per cent. of the purchase-money at the close of the sale, and if he should not complete his purchase, the premises would be offered for sale again, and the defaulting purchaser should not be benefited by any advance in price at such second sale, but liable for all loss and expense occasioned thereby. A purchaser of the premises for \$9,900 paid the ten per cent., but did not pay the balance of the purchase-money, and the premises bought by him were resold by the sheriff, and brought \$10,500.—*Held*, that he was entitled to recover the ten per cent. deposited by him.

On appeal from an order granted by Vice-Chancellor Van Fleet, whose opinion was as follows:

The petitioner, Isaac B. Parker, asks to have certain moneys returned to him, which he paid in part performance of a contract for the purchase of a part of the mortgaged premises sold under

NOTE.—In *Ex parte Hunter*, 6 Ves. 94, 97, Lord Eldon said: "If the recent sale produced more than the original purchase-money, the purchaser who had violated his agreement could not call for an account of the surplus."

In *Thompson v. Kelly*, 101 Mass. 291, a house, fitted only with cold water, was advertised, in the newspapers, to be sold at auction, as "fitted with hot and cold water," and subject to examination at any time before the sale, on application to the auctioneer. At the sale the auctioneer read the terms of sale, and announced that there was an error in the advertisements as to the house being fitted with hot water. It was bought by the defendant, who had read the advertisement, but arrived at the sale after the auctioneer had made his statement. The defendant, without reading them, signed the terms of sale, which contained a copy of the advertisement, with the words "hot and" erased, and with the ordinary clause as to the forfeiture of the purchaser's deposit in case of his default. The defendant, after his purchase, asked for, and obtained the keys of the house, stating that if it was all right he would pay the deposit (\$200) at once. Upon examining the house he found that it was not fitted with hot water, and returned the keys, informing the auctioneer that he would not take the house, nor pay the \$200, whereupon the auctioneer re-

Chancellor v. Gummere.

the decree made in the above-stated cause. The facts necessary to be considered in deciding his application, may be stated as follows: A final decree was made in this cause, June 26th, 1876, directing a sale of the mortgaged premises, to raise and pay to the complainant nearly \$37,000; the mortgaged premises were sold in two parcels, on the 21st of December, 1876; the petitioner purchased one of the parcels for \$9,900; one of the conditions of sale, under which he purchased, required him to pay ten per cent. of the amount of his bid at the close of the sale, and to sign an acknowledgment of his purchase; he complied with this; another of the conditions provided that "any person or persons purchasing at this sale, and not complying with the foregoing articles and conditions, the property so struck off and sold to him or them will be offered for sale a second time, and the first purchaser or purchasers will not be benefited by any advance, but will be held liable for all loss and expense occasioned thereby;" the petitioner did not pay the balance of the purchase-money, and that parcel of the mortgaged premises which he had agreed to purchase was re-advertised, and after nine adjournments was, on the 13th of September, 1877, sold to another purchaser for \$10,500, being \$600 in excess of the sum the petitioner agreed to pay; this excess was more than sufficient

advertised the house for sale on account of the defendant, and resold it for \$30 more than the amount of his bid.—*Held*, that the auctioneer could recover the \$200 from the defendant without deduction on account of the \$30.

In *Mealey v. Page*, 41 Md. 172, an executor sold lands under a testamentary power to a purchaser, who signed an agreement, binding himself to comply with the terms of sale, upon its ratification by the orphans court. The sale was reported to the court, and duly confirmed, but the purchaser made default, whereupon the court, under the statute, ordered the land to be resold at his risk. It was resold, and the amount then bid exceeded that which was bid at the first sale.—*Held*, that the original purchaser was entitled to the excess, after deducting therefrom the costs and expenses incurred by reason of his default. This case was afterwards approved in *Early v. Dorsett*, 45 Md. 462, 466.

See, also, *Brundige v. Morrison*, 56 Md. 407, 414.

In *Barrell, ex parte*, L. R. (10 Ch.) 512, there was no stipulation as to the forfeiture of the deposit, in case the purchase went off through the purchaser's default. After the title had been accepted, the purchaser became bankrupt, and his trustee disclaimed the contract, under the bankruptcy act, and called

Chancellor v. Gummere.

to cover the interest on the purchase-money the petitioner had agreed to pay for the period intervening between the first and second sales, and the costs and expenses of the second sale; the purchaser at the second sale paid his bid; the petitioner, at the time of his purchase, was the owner of the equity of redemption of the mortgaged premises, having purchased them at sheriff's sale under executions issued on judgments recovered at law against the mortgagor, but he was in no way liable or bound for the mortgage debt. The proceeds realized from the sale of the mortgaged premises were not sufficient to satisfy the complainant's decree by \$20,000. The ten per cent. paid by the petitioner on his purchase has been brought into court by the sheriff, and the petitioner now asks to have the money returned to him.

The rights of the parties must be determined by their contract. This contract was made with the court, and for that reason should be so construed as to work no oppression or injustice. Lord Macclesfield once said, in a case somewhat similar, that the court ought not to be partial to itself, or carry that farther than it would a contract betwixt party and party. On the other hand, the court might be said to have rather a greater power over a contract made with itself than with any other. *Savile v. Savile*, 1 P. Wms. 745. The important question here, as it is in all cases

upon the vendor to repay the deposit.—*Held*, that the vendor was entitled to retain it. Also, *Kell v. Nokes*, 14 W. R. 908; *Depree v. Bedborough*, 4 Giff. 479; *Forster v. Hayman*, 26 Pa. St. 266, 268.

In *Bleeker v. Graham*, 2 Edw. Ch. 647, it was held that there could be no forfeiture of a deposit, unless there was an express stipulation to that effect. See *Casson v. Roberts*, 31 Beav. 613; *Thomas v. Brown*, L. R. (1 Q. B. D.) 714; *Hinton v. Sparkes*, L. R. (3 C. P.) 161.

In *Tindles' Appeal*, 77 Pa. St. 201, lands were sold under an execution on a mortgage, which was the first lien, and the purchaser paid \$850 on his bid, but failing to complete his purchase, the sheriff sold the same premises on another execution on a subsequent judgment, and subject to the mortgage for a sum which, with the amount due on the mortgage and the \$850, was no greater than the first bid.—*Held*, that the next lien creditor, not paid by the second sale, and not the first purchaser, was entitled to the \$850.

In *Schoening v. Leeds*, 7 W. N. C. (Pa.) 242, a defaulting purchaser was held liable, notwithstanding a second sale for a greater price than the amount of his bid, when the second purchaser also made default.—*REP.*

Chancellor v. Gummere.

involving the interpretation of contracts, is, What did the parties mean? And in this case, as in all others where the contract is in writing, we must go to the writing for the answer. Now, on looking into the contract in this case, the first thing that attracts attention bearing on the question in hand, is that express provision is made for a resale in case the first is not carried out. The vendor reserves a right to rescind by a resale, in case the first purchaser does not perform his contract. Express provision is also made that if damage results from such second sale, the first purchaser shall be liable for it. It thus clearly appears that compensation or indemnity, in case of loss, was before the minds of the parties; they made a provision for it, but they made no express provision upon the subject of forfeiture or penalty. The parcel purchased by the petitioner having been sold at the second sale for a price so much larger than that which the petitioner agreed to give, the ultimate effect of his default was rather to help than to harm the vendor. It is certain there was no loss or damage, and the petitioner is therefore under no duty, by the terms of his contract, to make compensation.

The only other ground, then, on which it can be said, as it seems to me, that the petitioner has lost his right to reclaim the money, is, that by his failure to keep his contract, the money he paid became forfeited. A forfeiture for the non-performance of a condition can only be awarded on plain words or unavoidable implication. Forfeitures are not favored in equity; indeed, they are opposed to its general principles. The opposition is fundamental, for what are they but a compulsory transfer of what belongs to one person to another as a compensation for the other's wrongs, regardless of the proportion which the value of the thing forfeited bears to a pecuniary estimate of the injury sustained? Why, in this case, if the money paid by the petitioner has, by the terms of the contract, become forfeited, the court, I suppose, must so adjudge, though it should appear that the mortgaged premises, at the second sale, were sold for enough to pay the whole amount of the decree. It is certain, as already remarked, that there are no express words in this contract which show that the parties intended, in case the purchaser did not perform, that

Chancellor v. Gummere.

the money he paid in part performance should be forfeited. And it seems to me to be equally clear that no such intention can be imputed to them by implication. There is, however, an adjudication which seems to hold that clauses of forfeiture in such contracts are superfluous, and that a contract without such a clause is entitled to the same legal effect, precisely, as a contract containing such a clause. Such, in substance, is the doctrine on which *Battle v. Rochester City Bank*, 5 Barb. 414, was decided. The decision in that case was affirmed by the court of appeals, but the decision of the appellate court was put on a ground entirely distinct from that on which the case was decided in the court below. The court of appeals held that, assuming that the contract had been rescinded by mutual consent, and that the plaintiff was, in consequence, in position to ask to have returned to him what he had parted with in part performance of the contract, still he was not entitled to recover, for what he had parted with was land, and not money, and he was before the court asking for money in the place of the land before he had been denied the land. *Battle v. Rochester City Bank*, 3 N. Y. 88.

The doctrine on which *Battle v. Rochester City Bank* was decided by the supreme court, seems to have originated with Sir Edward Sugden. After commenting on *Palmer v. Temple*, 9 Ad. & El. 508—a case which will be more particularly referred to hereafter—in his Treatise on Vendors and Purchasers, he says: “The question will then remain, whether the seller’s resale of the estate will give the purchaser a right to rescind. It would seem not, if the sale was after the purchaser’s default; for as the purchaser, by his act, has lost the right to enforce the contract, the disposal of the estate by the seller prejudiced no right of the purchaser, and could impart to him no right to rescind a contract which he had already broken. The sale does not purge the previous default of the purchaser. To him it matters not whether the seller receives the profits himself, or lets or sells the estate, for in either case he cannot enforce the contract. The sale, it is argued, prevents the seller from performing the first contract. But the answer to this is, that he cannot be compelled to perform it. How, therefore, does it differ the case that he has sold what he

Chancellor v. Gummere.

might, in spite of the purchaser's claim, retain in his own hands for his own use? He has sold what the purchaser has lost the right to demand. The second sale does not give to the purchaser a right of action for damages, although the subject of the first contract is disposed of. If, therefore, in consequence of the purchaser's default, the seller is at liberty to resell for his own profit, he does a lawful act from which no damage results to the first purchaser, and which, it should seem, cannot revive in the latter a right to recover the deposit which did not exist before the second sale." *1 Sugd. on Vend. 412*. The vice of this argument is apparent. It assumes that the failure of the purchaser to pay the balance of the purchase-money at the time agreed upon works a forfeiture of all his rights under the contract. In the absence of a clear agreement to that effect, such are not the consequences of a failure to perform at the time fixed. On a valid contract being made, the purchaser in equity becomes the owner of the land; the vendor becomes the trustee of the legal title for the vendee, and the vendee becomes the trustee of the purchase-money for the vendor. The parties may agree either by the contract of purchase, or by one subsequently made, how their mutual rights and obligations in this respect may be terminated, or they may be absolved from the contract by judicial action, but while the contract remains in force, the lands, in equity, are the property of the vendee, and no sale will be effectual against his rights until they reach the hands of a *bona fide* purchaser who actually pays value for them. *Houghwout v. Murphy*, 7 C. E. Gr. 531.

And even at law it has been held that, in the absence of a clause of forfeiture, the vendee may, after the vendor has conveyed the subject of the sale to another purchaser, recover the money he has paid on the purchase, though it was his fault that the contract was not performed. In *Palmer v. Temple*, the case already mentioned, the facts were these: the plaintiff agreed to purchase a lease of the defendant, and paid down £300 of the purchase-money at the time the contract was signed; he failed to pay the residue; the defendant afterwards sold the lease to another purchaser, and put him in possession of

Chancellor v. Gummere.

the demised premises ; the plaintiff then brought an action to recover the amount he had paid on the purchase. The agreement contained a stipulation that if either party should refuse to perform, he should pay the other £1000 as in the nature of liquidated damages. On the trial it was not shown that the defendant had sold the lease to the second purchaser for less than the plaintiff had agreed to pay. It was decided that the action was well brought. Lord Denman, in delivering the opinion of the court, said : "The ground upon which we rest this opinion is, that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the whole instrument ; but as this imposes on either party that should make default a penalty of £1000, the intent of the parties is clear that there should be no other remedy." He also said that the vendor might sue for the penalty, and recover such damages as a jury thought proper to award, but he could not retain the deposit, for that must be considered not as earnest to be forfeited, but as part payment. And then he adds : "But the very idea of payment falls to the ground when both have treated the bargain as at an end ; and from that moment the vendor holds the money advanced, to the use of the purchaser." This, as it seems to me, must unquestionably be so under a contract which expressly reserves to the vendor the right, in case the vendee makes default, to rescind by reselling, and by which the parties stipulate that in case loss results to the vendor from the second sale, the vendee shall make it good. Such a provision for indemnity excludes the idea of forfeiture, or that the vendor shall have anything more than compensation.

The principle established by *Palmer v. Temple* has been followed in this state. In *Hoagland ads. Hall*, 9 Vr. 350, the plaintiff sued on a check given to him by the defendant in part payment of the sum he had agreed to pay the plaintiff for certain chattels and the assignment of a lease ; the defendant failed to pay the balance at the time agreed upon, and the plaintiff, after assigning the lease and making sale of the chattels to other persons, brought suit on the check. The court, in passing upon his right to recover, first affirmed the correctness of the principle

Chancellor v. Gummere.

laid down in *Palmer v. Temple*, and then added: "The right to payment of money arising from a sale can exist only when the title to the property sold has been or can be passed to the vendee; and after the vendee has refused to execute any part of the bargain, the vendor's whole claim to pay consists in his still being willing that such title shall pass." It was held that the plaintiff was not entitled to recover. The important principle established by the decision is this: that where a vendee refuses to fulfill his contract, and the vendor subsequently parts with the subject of the sale, and thus puts it out of his power to perform his contract, the only remedy left him, in such a condition of affairs, is an action against the vendee for the loss of the bargain.

Even where the contract provides that if the vendee makes default he shall forfeit his deposit, and also be liable for any damages resulting from a resale, it has been held that if, on a resale, damages accrue, the vendee is entitled to have the amount of his deposit recouped against the damages, and the vendor is only entitled to recover the excess of the damages. *Ockenden v. Henly*, *El., Bl. & El.* 485.

On the argument, my attention was called to an unreported case decided by this court at the May Term, 1873. The name of the case is *Scheider v. Ramsey*. The mortgage on which the suit in that case was founded was made by Catharine Ramsey to the complainant, to secure a debt due from John Ramsey to the complainant. The suit was undefended, and a final decree was made in due course. At the first sale John Ramsey, became the purchaser of the mortgaged premises. He was the real debtor. He purchased under conditions requiring him to pay ten per cent. of the amount of his bid, and they also provided that in case he did not complete his purchase the property should be resold, and if, at the resale, it was sold for less than his bid, with interest and costs added, he should be liable for the deficiency; and by a further provision of the conditions, the sheriff was directed to apply the ten per cent. paid by him to the payment of such deficiency. Ramsey paid the ten per cent., but did not complete his purchase. The mortgaged premises were again sold, and at such resale were bid off by another person for a sum

Chancellor v. Gummere.

\$600 in excess of Ramsey's bid. The second purchaser paid the ten per cent., but did not pay the balance of his bid. A third sale was then made, and the price obtained at this sale was over \$4000 less than at either of the previous sales. The last sale was completed. After applying the money raised by the last sale, a large balance still remained due to the complainant on his decree. The court directed the sheriff to bring both deposits into court, and they were, by order of the court, paid to the complainant. This disposition of the money was, unquestionably, as against both purchasers, both legal and just. Though the mortgaged premises were bid up, at the second sale, to a sum more than sufficient to relieve the first purchaser, the sale proved abortive and nothing was realized. In fact, no effectual sale was made. Besides, the purchaser at the first sale was the real debtor—the property of his surety had been sold to pay his debt—and the court having, through its officer, obtained possession of his money, was bound, on the plainest principles of justice, to apply it to the payment of his debt. Both his surety and his creditor had a right to have it so used.

The rights of the complainant against the purchaser at the second sale were even more obvious. The deficiency between the price realized at the third sale and that at which he purchased, having greatly exceeded the sum paid by him on his purchase, and the directions of the conditions under which he purchased being that the sum so paid by him should, in case of a deficiency, be applied in payment of such deficiency, the court could do nothing but apply the money paid by him according to the plain direction of his contract. From this brief statement it will be perceived that the two cases are so radically dissimilar in all their essential characteristics, that it is impossible to decide the one now under consideration by the legal rules which controlled the decision of the other.

The petitioner is, in my judgment, entitled to the order he asks.

Mr. S. M. Dickinson and *Mr. G. Collins*, for appellant.

In this case there was a foreclosure sale of land owned by

Pedrick v. Pedrick.

Isaac B. Parker. He was himself (by an agent) the purchaser of one parcel for \$9,900, on which he paid ten per cent., or \$990, December 21st, 1876, and agreed to pay the residue, and receive deed December 30th. He did not pay the rest of the price, and the property was resold September 18th, 1877, and bought in by the complainant for \$10,500, leaving a large deficiency on the decree. The defaulting purchaser applied to have refunded his payment of \$990. The vice-chancellor advised an order refunding the payment, and from that order this appeal is brought. Parker assigned his claim to Frederick Kingman, since deceased, whose administrator, therefore, is the party to the record. *Ketchum v. Evertson*, 13 Johns. 359; *Green v. Green*, 9 Cow. 46, 51; *Haynes v. Hart*, 42 Barb. 58; *Battle v. Rochester City Bank*, 3 N. Y. 91; *Haven v. Patterson*, 43 N. Y. 218; *Page v. McDonnell*, 55 N. Y. 299; *Seymour v. Bennett*, 14 Mass. 266; *Rounds v. Baxter*, 4 Greenl. 454; *Morton v. Chandler*, 6 Greenl. 142; *Smith v. Haynes*, 9 Greenl. 128; *Woodward v. Boston*, 115 Mass. 81; *Hansbrough v. Peck*, 5 Wall. 497; *Wheeler v. Mather*, 56 Ill. 241.

Mr. L. T. Hannum, for respondent.

PER CURIAM.

Decree unanimously affirmed for the reasons given by the vice-chancellor.

SOMERS PEDRICK, appellant,

v.

SARAH J. PEDRICK, respondent

On appeal from a decree dismissing the appellant's petition for a divorce on the ground of adultery, advised by Vice-Chancellor Bird.

Mr. J. J. Crandall, for appellant.

Holcombe v. Holcombe.

Mr. John Harris, for respondent.

PER CURIAM,

This decree affirmed for the reasons given by the vice-chancellor.

For affirmance—THE CHIEF JUSTICE, DEPUE, MAGIE, REED, SCUDDER, VAN SYCKEL, CLEMENT, PATERSON, WHITAKER—9.

For reversal—DIXON, PARKER, BROWN—3.

ELEANOR HOLCOMBE et al., appellants,

v.

LEVI HOLCOMBE et al., respondents.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is as follows :

The evidence, viewed as a whole, leaves no doubt on my mind, that the testator, up to the time he was stricken with paralysis, was competent either to make or revoke a will. If he destroyed his will prior to July 12th, 1882, there can be no doubt that its destruction amounted in law to an effectual revocation. There is no direct proof of revocation. If the will was revoked at all, it was revoked by destroying it. No one saw it destroyed ; at least, there is no proof of that kind in the case. The evidence of two witnesses puts the will into the possession of the testator about the middle of June, 1882, and there all further trace of it is lost. One of these witnesses swears that at the time the testator took possession of the will he said he intended to destroy it, and the same witness swears that the testator subsequently stated to him that he (the testator) had told a third person that

Holcombe v. Holcombe.

he had destroyed the will, but that third person testifies that the testator never told him so. If the evidence of these two witnesses is believed, the fact of revocation is fully proved, for the courts of both the United States and England hold, as a well-established principle, that where a will is traced to the possession of the person who made it, and after his death it is found among his papers mutilated in such a manner as to indicate that he intended to revoke it, or it is not found at all, the law presumes that the testator mutilated or destroyed the will *animo revocandi*. 1 Redf. on Wills 307 ¶ 8; 330 ¶ 48.

The decision of the case turns upon the question whether the evidence of these two witnesses is believed or not. They are the only persons now living who saw the will pass into the possession of the testator, and heard what he said concerning it. For this reason it is not possible to contradict their evidence, in its most vital point, by evidence drawn from other sources than themselves. The court should, therefore, deal with their evidence with the utmost caution, and scan it very closely. I have tried to do so, and after very full and careful consideration, I am obliged to say that I find nothing in their evidence nor in the other evidence in the case, which leads me to doubt the substantial truth of their story. While they are deeply interested in the result of this contest, and subject to the bias naturally incident to their position as parties litigant, they seem, in testifying, to have been frank and candid, and I have failed to find anything, either in their evidence or their conduct, which would justify a belief that they have deliberately stated anything that they knew to be untrue. There is nothing in their evidence so unnatural or improbable as to shock my credulity. The events they describe are just such as might naturally happen under the circumstances. Their conduct in connection with the will, as they describe it, may not appear now to have been as cautious or as circumspect as that of a person of unusual foresight might have been; but we are bound to remember that we are looking at their conduct in the light of subsequent events, but when they acted they could not foresee what would occur in the future. I think their evidence is entitled to credit. It is in one particular,

Knowles v. Downie.

at least, strongly corroborated. Its effect on my mind has been, notwithstanding the most rigorous tests I was able to apply, to convince me that the will passed into the testator's possession while he possessed sufficient capacity to revoke it. The establishment of this fact entitles the defendants, under the rule of law above stated, to a dismissal.

But I do not think they are entitled to costs. The two who knew all about the circumstances under which the will got into the possession of the testator, were not frank and open in disclosing to the complainants what they knew. Their utterances were certainly vague and somewhat mysterious—sufficiently so to justify suspicion. It is this part of their conduct which has created the strongest doubts in my mind as to the degree of credit which their evidence should receive. Their conduct naturally provoked suspicion and invited investigation, and, I think, therefore, that the complainants' bill should be dismissed without costs, each party paying their own.

Messrs. J. G. Shipman & Son, for appellants.

Mr. R. S. Kuhl, for respondents.

PER CURIAM.

Decree unanimously affirmed for the reasons given by the vice-chancellor.

ALLEN KNOWLES, administrator of SAMUEL THOMPSON, deceased, appellant,

v.

ANNIE DOWNIE, respondent.

On appeal from a decree of the ordinary, whose opinion is reported in *Downie v. Knowles*, 10 Stew. Eq. 513.

Simpson and Smith *v.* Lister.

Mr. George S. Hilton and *Mr. J. S. Barkalow*, for appellants.

Mr. Eugene Stevenson, for respondent.

PER CURIAM.

Decree unanimously affirmed for reasons given by the ordinary.

JOHN H. BURRELL, JR., trustee &c., appellant,

v.

WILLIAM MASSEY et al., respondents.

On appeal from an order advised by Vice-Chancellor Bird.

Mr. H. A. Drake, for appellant.

Mr. B. Williamson and *Mr. S. H. Grey*, for respondents.

PER CURIAM.

Decree unanimously affirmed for reasons given by the vice-chancellor.

GEORGE F. SIMPSON and CHARLES B. SMITH, appellants,

v.

EDWIN LISTER, respondent.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Lister v. Simpson*, 11 Stew. Eq. 438.

Messrs. Coult & Howell, for appellants.

The dispute in this case is between a judgment creditor and a chattel mortgagee for priority of position. The facts of the case

Simpson and Smith v. Lister.

are, shortly, these: George F. Simpson was the owner of the stock of drugs in a drug store in Newark, and was carrying on the drug business at that place. On December 1st, 1881, he mortgaged the same to Edwin Lister, to secure the sum of \$2,000.

On October 17th, 1883, Lister took possession of all the contents of the store, and advertised the same for sale on October 23d, 1883.

On October 20th, 1883, the appellant Smith recovered a judgment against Simpson in the Essex circuit court, on which execution was issued, by virtue of which execution a levy was taken by the sheriff of Essex on the contents of the drug store.

The chattel mortgagee proceeded to sell the chattels levied on by the sheriff on October 23d, 1883, and the sheriff brought suit in trover against the mortgagee for the goods. Then the mortgagee filed his bill in chancery to restrain the action at law, and to procure a new foreclosure of the mortgage.

The answer admits all the material facts set out in the bill, and the cause was brought to a hearing on the bill and answer only.

The claim of the judgment creditor is that the chattel mortgage is void, as a fraud upon creditors, and, as against his levy, has no standing as a lien on the chattels levied on, and this claim is based on the fact that the mortgage provides *that the mortgagor may sell the chattels mortgaged in the regular course of business*, and thus divest himself and the mortgage, also, of all title to and interest in the chattels.

We claim that this provision makes the mortgage *ipso facto* void, the argument being that the mortgagor retains not only the possession of the property mortgaged, but also the absolute control of it *for his own benefit*, and that while such an arrangement is no security to the pretended mortgagee, it is, if sustained, a shield to ward off the other creditors, and so hinders and delays them.

Professor James O. Pierce has collected all the cases on the subject in his book, *Fraudulent Mortgages of Merchandise*, published by F. H. Thomas & Co., St. Louis, 1884, and has shown that the weight of authority is in favor of our insistent.

Simpson and Smith v. Lister.

The foundation of the rule, as we claim it, is *Twyne's Case*; and the rule has been laid down in the following English cases: *Ryall v. Rowles*, 1 Ves., Sr., 348, and 1 Wils. 260; *Worseley v. De Mattos*, 1 Burr. 467; *Edwards v. Harben*, 2 Term R. 287; *Paget v. Perchard*, 1 Esp. 205; *Wordall v. Smith*, 1 Camp. 332; *Reed v. Blades*, 5 Taunt. 212.

There do not appear to be any recent English cases in which the exact point is involved or considered. There are recent cases which hold that retention of possession alone by the mortgagor is not conclusive evidence of fraud, but we find no case in which the absolute power of disposition for his own benefit by the mortgagor is an element. *Martindale v. Booth*, 3 B. & Ad. 498.

The leading case on the subject in the United States is *Robinson v. Elliot*, 22 Wall. 513, in which Davis, J., declares a mortgage of such character to be fraudulent in law, and void as to other creditors. He says: "Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own; sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they might be indefinitely prolonged. * * * It hardly need be said that a mortgages, which, by its very term, authorizes the parties to accomplish such object, is, to say the least of it, constructively fraudulent."

The doctrine has been followed in Virginia—*Lang v. Lee*, 3 Rand. 410; *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 755. In New York—*Wood v. Lowry*, 17 Wend. 492; *Edgell v. Hart*, 9 N. Y. 213; *Mitnacht v. Kelley*, 3 Keyes 407; *Russell v. Winne*, 37 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424. In New Hampshire—*Coburn v. Pickering*, 3 N. H. 415; *Putnam v. Osgood*, 51 N. H. 192. In Ohio—*Collins v. Myers*, 16 Ohio 547; *Freeman v. Rawson*, 5 Ohio St. 1. In Minnesota—*Chophard v. Bayard*, 4 Minn. 533.

Simpson and Smith v. Lister.

In *Stein v. Munch*, 24 Minn. 390, the facts seem to be identical with the facts in the case under consideration. There the property was a retail stock of drugs, and the mortgage reserved a power of sale; and it was held that the transaction was not validated by the mortgagee taking possession of the goods by virtue of the mortgage. In Wisconsin—*Place v. Langworthy*, 13 Wis. 629; *Steinart v. Denster*, 23 Wis. 136; *Blakeslee v. Rossman*, 43 Wis. 116. In Illinois—*Davis v. Ransom*, 18 Ill. 396; *Greenebaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, 90 Ill. 376. In Missouri—*White v. Graves*, 68 Mo. 218. In Tennessee—*Tenn. Nat. Bank v. Ebbert*, 9 Heisk. 153. In Mississippi—*Joseph v. Levi*, 58 Miss. 843. In Colorado—3 Col. 139. In Oregon—*Bremer v. Fleckenstein*, 9 Oreg. 266. In West Virginia—*Garden v. Bodwing*, 9 W. Va. 121.

The federal district and circuit courts have also frequently declared the doctrine. In *re Kirkbridge*, 5 Dill. (Mo.) 116. Dillon, J., stated the rule as follows: "A conveyance of personal property to secure creditors, when the grantor, by the understanding of the parties, expressed or implied, is to remain in possession of the property, *with a power of sale*, is void upon a principle of public policy embodied in the statute, irrespective of any question of actual or intended fraud." In *re Forbes*, 5 Biss. (Ill.) 510; In *re Bloom*, 17 N. B. R. (N. J.) 425; *Wells v. Langbein*, 20 Fed. Rep. (Iowa) 183; In *re Cantrell*, 6 Ben. (N. Y.) 482; *Smith v. Ely*, 10 N. B. R. (N. Y.) 553; *Crooks v. Stewart*, 2 McCrary (Iowa) 13; In *re Kahley*, 2 Biss. 387; *Catlin v. Currier*, 1 Sawy. 12.

Woods, J., in *Johnson v. Patterson*, 2 Woods (Ga.) 443, says: "The general rule is that a chattel mortgage, with possession left in the mortgagor *and power of sale*, is fraudulent and void."

The precise question involved in this case has never arisen in New Jersey. As stated by the vice-chancellor in his opinion, the question here has always been whether mere retention of the possession of mortgaged chattels by the mortgagor makes the mortgage void. Our courts have not had, until now, an opportunity to decide upon the effect of the *reserved power of sale*.

Simpson and Smith v. Lister.

Mr. David A. Ryerson, for respondent.

I. George F. Simpson appeals from that part of the final decree in the cause which adjudges that he should pay to the complainant \$1,451.20.

Simpson is not entitled to prosecute an appeal, for the reason that he did not answer or appear in the cause at any time; a decree *pro confesso* was entered against him, and the decree was made in his absence. *Townsend v. Smith*, 1 *Beas.* 350.

II. Charles B. Smith appeals from that part of said decree which adjudges the mortgage given by Simpson to Lister to be a lien upon the chattels therein described.

The chattels in question are those purchased by the mortgagor, subsequent to the making of the mortgage, to replace those sold in the regular course of his business. By its terms the mortgage covered such after-acquired chattels. No claim is made that there was any fraud in fact in the execution of the mortgage, or that the respondent knowingly allowed it to be used for a fraudulent purpose.

1st. A mortgage on chattels thereafter to be acquired is good in equity.

Although, at law, a mortgagor must have a present property, either actual or potential, in the things mortgaged to make a valid mortgage (*Looker v. Peckwell*, 9 *Vr.* 253; *S. C. on error*, 10 *Vr.* 134), in equity the rule is otherwise, and a mortgage valid, both as between the parties and as against the creditors of the mortgagor, may be made upon personal property to be acquired by the mortgagor after the execution of the mortgage.

In such cases, though the property is not within the grasp of the mortgage at the date of its execution, yet it comes within its grasp the moment the mortgagor acquires title to it.

The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement which attaches to the property when acquired, and, in equity, transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done. *Jones on Chat. Mort.* § 170.

Simpson and Smith v. Lister.

This doctrine has been repeatedly held in the courts of our state. *Smithhurst v. Edmunds*, 1 *McCart*. 408; *Gevers v. Wright*, 3 *C. E. Gr.* 330, 333; *M. & E. R. R. Co. v. Sussex R. R. Co.*, 5 *C. E. Gr.* 542, 565; *Williamson v. N. J. Southern R. R. Co.*, 11 *C. E. Gr.* 398, 2 *Stew. Eq.* 320.

2d. A mortgage of a stock of merchandise, with power in the mortgagor to sell the goods in the usual course of trade, is not fraudulent in law.

The appellant claims that if it appears, by the terms of the mortgage, that the mortgagor was permitted to retain possession of the mortgaged chattels and sell them in the regular course of his trade, that a conclusive presumption is raised in law that the mortgage is fraudulent, and must be so declared by the court.

a. A conclusive inference or presumption that such a mortgage is fraudulent is in conflict with the course of judicial opinion of this state.

Prior to the statute providing for the recording of chattel mortgages, the continuing possession of the mortgagor was held to be only *prima facie* evidence of fraud, and might be explained; such possession was, at most, only evidence of the fact of fraud, but not a fact in judgment of law, of itself conclusively establishing the fraud.

The same rule of evidence seems to be now generally accepted elsewhere. The writer in *Jones on Chat. Mort.* § 320, says: "The modern English doctrine, and that more generally adopted by the American courts, is, that possession by a vendor or mortgagor is only *prima facie* a badge of fraud; that the presumption arising from that circumstance may be rebutted by explanations, showing the transaction to have been fair and honest; and that the question of fraud is always one of fact for a jury to determine."

(b) A conclusive presumption that such a mortgage is fraudulent is not consistent with the general policy of the chattel mortgage statute.

In *Gay v. Bidwell*, 7 *Mich.* 519, 525, Judge Campbell, says: "To hold that a merchant cannot mortgage his goods without closing his doors would be to hold that no mortgage of a merchant's stock can be made at all."

Simpson and Smith v. Lister.

It has been held that a judgment creditor, having a levy upon a stock of merchandise, may, without jeopardizing his rights, permit the debtor not only to hold and use the chattels levied upon, but to sell them in the regular course of his business. *Caldwell v. Fifield*, 4 Zab. 150. If the possession of a stock of merchandise, by a judgment debtor, carried with it the right to sell in the regular course of trade, certainly the lawful possession of a mortgagor should be held to be equally advantageous.

(c) A conclusive presumption that such a mortgage is fraudulent has no reason for its existence derived from general observation and experience.

In *Brett v. Carter*, 2 Low. 458, Judge Lowell says: "Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain installments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage; but I am asked to find fraud in law when I know, and it is admitted, there was none in fact."

(d) Without proof of external facts, a conclusive presumption, either of the intention of the parties, or of the bearing of the mortgage upon creditors, is impossible. *Gay v. Bidwell*, 7 Mich. 519; *Oliver v. Eaton*, 7 Mich. 108; *Cheatham v. Hawkins*, 76 N. C. 325.

(e) The doctrine that a mortgage of a merchant's stock, with power of disposal in the mortgagor in the usual course of trade, is conclusively fraudulent in law, is opposed to strong authority.

In England, "if fraud is alleged to exist in a sale or mortgage, it must be proved as a fact, and is never adjudged to exist, in law, on the face of the deed. Though the vendor or mortgagor remain in possession, and act as apparent owner of the mortgaged property, either with or without a power of disposal, the question of fraud is, in every case, to be determined as one of fact." *Jones on Chat. Mort.* § 413.

Also, among others, by the courts of Iowa, Kansas, Maine, Massachusetts, Michigan and Rhode Island—*Hughes v. Corey*,

Simpson and Smith v. Lister.

20 Iowa 399; *Frankhouser v. Ellet*, 22 Kan. 127, 150; *Fletcher v. Powers*, 131 Mass. 333; *Williams v. Winsor*, 12 R. I. 9; *Brett v. Carter*, 2 Low. 458; *Barron v. Morris*, 14 Bank. Reg. 371; *Mitchell v. Winslow*, 2 Story 630; *Miller v. Jones*, 15 Bank. Reg. 150; *Clark v. Hyman*, 55 Iowa 14; *Abbott v. Goodwin*, 20 Me. 408; *Googins v. Gilman*, 47 Me. 9; *Brown v. Thompson*, 59 Me. 372; *Briggs v. Parkman*, 2 Mete. 258; *Jones v. Huggesford*, 3 Mete. 515; *Oliver v. Galon*, 7 Mich. 108; *Gary v. Buwell*, 7 Mich. 519; *Leland v. Colver*, 34 Mich. 418; *People v. Bristol*, 35 Mich. 28; *Wrigler v. Sibley*, 35 Mich. 231; *Morris v. Stern*, 80 Ind. 227.

In support of the doctrine it is said that a mortgage which allows the mortgagor to sell the goods is no security, because he may, at any time, sell the entire property, and therefore the mortgage is of no benefit, except to ward off creditors. But the power of disposal contended for is that the mortgagor may sell in the ordinary course of trade. The mortgagor could not, if he would, make a valid sale of the entire property at once. The mortgage being duly recorded, a purchaser would have legal notice of the extent of the power of sale. *Jones on Chat. Mort.* § 422.

It is also urged that a mortgage of the character in question is, irrespective of fraud, against public policy.

In *Mitchell v. Winslow*, 2 Story 630, 647, Judge Story says: "I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Indeed the law makes the registration of the deed constructive notice of its contents to all persons, since it was required to be registered, and was registered in conformity to law. What ground is there, then, to assert that the conveyance was against the policy of the law? The phrase itself is somewhat indefinite, and, in its actual application here, is difficult to be grasped and comprehended. I profess that I am not able to perceive any; and, so far as authorities go, they point the other way."

In those states where this doctrine of constructive fraud has

Barrell v. Barrell.

been held most firmly it has now been so modified as, in great measure, to destroy its force.

In New York, Minnesota, Illinois, Missouri and Ohio, if the agreement to sell is not contained in the mortgage itself, the question whether there is any such agreement, and what are the indications of fraud arising from it, is one for the jury. *Jones on Chat. Mort.* § 424.

HARRY F. BARRELL, appellant,

v.

MARY BARRELL, respondent.

On appeal from a decree of the chancellor, whose opinion is reported in *Barrell v. Barrell*, 11 Stew. Eq. 60.

Mr. H. C. Pitney, Jr., for appellant.

Mr. John R. Emery and *Mr. H. C. Pitney*, for respondent.

PER CURIAM.

Decree unanimously affirmed for reasons given by the chancellor.

INDEX.

A.

Accident and Mistake.

1. A bill sought to set aside a contract for the sale of lands on account of defendant's fraud. There was no evidence of fraud, but defendant had been mistaken as to the deeds conveying title to him. He offered to supply the defects.—*Held*, that he should be allowed a reasonable time to do so, and that failing in that, the contract should be set aside on the ground of mistake. *Church of St. Francis v. Hargous*, 339
 2. The complainant and defendant were the owners of adjoining town lots. The complainant employed a surveyor to fix the dividing line between the lots, which the surveyor, by mistake, mislocated, and thereupon complainant, supposing that he was building upon his own land, inadvertently placed a small part of his house a few inches over on defendant's lot, the defendant being also then unaware of the encroachment.—*Held*, that equity would not enjoin an action of ejectment by defendant against complainant to recover possession of the strip so built upon. *Kirchner v. Miller*, 355
 3. Where executors filed a final account, charging themselves with a certain amount, the fact that a part of that amount consisted of securities, which they then supposed were good, but which they afterwards failed to collect, is not a mistake, for which they can obtain relief in equity six years thereafter, and especially so where the will directed the greater part of the legacies to be paid with the securities received by the executors from the testator, and some of those securities have been lost through the executors' delay and blunders in their attempts to collect them. *Beatty v. Trustees*, 452
 4. When parties have acted under a mutual mistake of law, and the party thereby jeopardized can be relieved without substantial injustice to the other side, equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him. *Freiknecht v. Meyer*, 551
- See* INSURANCE; MORTGAGE, 1, 6; PRACTICE, 3.

Account.

On demurrer to a bill against the inhabitants of a township, alleging that in 1875 the complainant gave the township his bond for \$1,000, secured by a mortgage on lands, to insure the payment

Account—Continued.

of \$3.50 per week so long as complainant's wife should be a charge on the township; that the township had received \$750 thereon, and that the mortgage had been canceled of record; that the wife was not a public charge after 1875—*Held*, that complainant is entitled to a discovery and account of the moneys received on the bond. *Colthar v. North Plainfield*,

380

See LANDLORD AND TENANT.

Agency.

In 1872 complainant gave to an agent written authority "to assign, satisfy or discharge all mortgages made to him." The agent, thereunder, assigned to the defendant a mortgage of \$10,000, declaring that the assignment was for the benefit of complainant. The agent applied the \$10,000 to his own use.—*Held*, the complainant was bound by the assignment and the agent's concomitant declarations; the defendant testifying that he had no knowledge of the agent's fraud. *Chetwood v. Berrian*,

203

See ESTOPPEL, 2; EXECUTORS, 8, 11; INSURANCE.

Appeal.

1. The time within which an appeal from the orphans court is to be taken, is computed not from the delivering of the court's opinion, but from the signing, filing or entering of the order or decree in the minutes of the court. *Mount v. Slack*,

230

2. A substituted decree, made while the defendant is in contempt, may be without notice, but he has the right to appeal therefrom. *Wharton v. Stoutenburgh*,

299

See EXECUTORS, 18; PRACTICE, 4.

Arbitration.

An award cannot be extended beyond the things submitted; and even if the language of the submission be broad enough to cover a claim subsequently sought to be enforced, yet if it be clearly made to appear that the claim was not before the arbitrators, and was not passed upon by them, the award will not bar it. *Lee v. Dolan*,

193

Attorney and Client.

When two persons, a husband and wife, employ an attorney in the same business, communications made by them in pursuance of such common retainer are not privileged *inter sese*. *Gulick v. Gulick*,

516

See EXECUTORS, 13; SOLICITOR.

B.

Bankruptcy.

The right to recover property conveyed in fraud of creditors by a debtor subsequently adjudicated a bankrupt, is vested in his assignee alone, and the failure of the assignee to bring an action to recover the property within the time limited by the bankrupt law, does not transfer the right to bring such action to the creditors of the bankrupt. *McCartin v. Perry*, 198

C.

Cases Criticised.

Barrell <i>v.</i> Barrell, 11 Stew. Eq. 60.	
<i>Affirmed</i> , Barrell <i>v.</i> Barrell,	603
Buckingham <i>v.</i> Ludlum, 8 Stew. Eq. 71.	
<i>Affirmed</i> , Ludlum <i>v.</i> Buckingham,	563
Chetwood <i>v.</i> Berrian, 12 Stew. Eq. 203.	
<i>Affirmed</i> , Chetwood <i>v.</i> Berrian,	517
Clinton Bank <i>v.</i> Cummins, 11 Stew. Eq. 191.	
<i>Affirmed</i> , Clinton Bank <i>v.</i> Cummins,	577
Cubberly <i>v.</i> Cubberly, 6 Stew. Eq. 82.	
<i>Affirmed</i> , Cubberly <i>v.</i> Cubberly,	514
Davis <i>v.</i> Clark, 11 Stew. Eq. 472.	
<i>Affirmed</i> , Davis <i>v.</i> Clark,	336
Dewey <i>v.</i> Moyer, 72 N. Y. 70.	
<i>Denied</i> , McCartin <i>v.</i> Perry,	201
Downie <i>v.</i> Knowles, 10 Stew. Eq. 513.	
<i>Affirmed</i> , Knowles <i>v.</i> Downie,	594
Dupuy <i>v.</i> Wurtz, 53 N. Y. 556.	
<i>Denied</i> , Harral <i>v.</i> Harral,	286
Freiknecht <i>v.</i> Meyer, 11 Stew. Eq. 315.	
<i>Reversed</i> , Freiknecht <i>v.</i> Meyer,	551
Gardner <i>v.</i> Gardner, 10 Stew. Eq. 487.	
<i>Affirmed</i> , Gardner <i>v.</i> Gardner,	337
Gulick <i>v.</i> Gulick, 11 Stew. Eq. 402.	
<i>Affirmed</i> , Gulick <i>v.</i> Gulick,	516
Harrall <i>v.</i> Wallis, 10 Stew. Eq. 458.	
<i>Affirmed</i> , Harral <i>v.</i> Harral,	279
Larison <i>v.</i> Polhemus, 9 Stew. Eq. 506.	
<i>Affirmed</i> , Larison <i>v.</i> Polhemus.	303
Lister <i>v.</i> Simpson, 11 Stew. Eq. 438.	
<i>Affirmed</i> , Simpson <i>v.</i> Lister,	595
McKelway <i>v.</i> Armour, 2 Stock. 115.	
<i>Denied</i> , Kirchner <i>v.</i> Miller,	358

Cases Criticised—Continued.

Mingus v. Condit, 8 C. E. Gr. 313.	
<i>Denied</i> , Clinton Bank v. Cummins,	580
Palys v. Jewett, 5 Stew. Eq. 302.	
<i>Distinguished</i> , Kerr v. Little,	84
Reynolds v. Jackson, 9 Stew. Eq. 515.	
<i>Reversed</i> , Jackson v. Reynolds.	313
Ritter's Appeal, 23 Pa. St. 95.	
<i>Explained</i> , Rogers v. Hand,	275
Russell v. Asby, 5 Ves. 98.	
<i>Overruled</i> , Cary v. Cary,	5
Shotwell v. Denman, Coxe 174.	
<i>Overruled</i> , Sharp v. Wyckoff,	379
Smith v. Gaines, 11 Stew. Eq. 65.	
<i>Reversed</i> , Gaines v. Smith,	545
Tasto v. Klopping, 14 Vr. 448.	
<i>Approved</i> , Freiknecht v. Meyer,	551
Tichenor v. Allen, 13 Gratt. 15.	
<i>Denied</i> , McCartin v. Perry,	201
Trenton Board of Health v. Hutchinson, 12 Stew. Eq. 218. †	
<i>Affirmed</i> , Hutchinson v. Trenton Board of Health,	569

Compromise.

See EXECUTORS, 15.

Constitution.

1. The constitution of New Jersey prohibits the passing of local or special laws, "creating, increasing or decreasing the percentage or allowance of public officers during the term for which they were elected or appointed," and requires that the legislature shall pass general laws for such cases. An act of 1882 provided that in all counties where the county clerks were *then* paid an annual salary, the deputy should receive \$2,000 per annum, payable quarterly by the collectors of those counties respectively. It appeared that there was but one county in the state where the clerk *then* received an annual salary. The deputy clerk of that county resigned his office ten days before the approval of the act of 1882, and was re-appointed two days after its approval, and his counsel insisted that, consequently, the act of 1882 was not passed "during his term."—*Held*, that, while deputy clerks of counties are "public officers," they have no "term," within this constitutional clause, since their appointments are mere private arrangements with their respective county clerks; and that the act is unconstitutional and void, both as increasing an incumbent's salary, and also as regulating the internal affairs of a county by a special or local law; and further, that the tax-payers of the county are entitled to relief by injunction, since the chosen free-

Constitution—Continued.

- holders of that county persist in paying the deputy clerk the salary under the act, out of the county treasury, and that, too, in monthly payments. *Gibbs v. Morgan*, 126
2. A statute provided that, in any county in which the fees &c. allowed county clerks for services should be collected and paid over for the use of the county, it should be lawful to have an assistant clerk, who should be paid by the county collector; that each of the clerks of said counties, whenever the population thereof exceeded sixty thousand, should appoint an assistant clerk, who should possess and exercise all the powers of the county clerk during the latter's absence, and that he should be paid an annual salary of \$2,000.—*Held*, that the act was unconstitutional, as being special legislation regulating the internal affairs of a county. *Ernst v. Morgan*, 391
3. The West Line grant was not in violation of the constitutional prerogative of congress to regulate commerce with foreign nations and among the several states. *American Dock Co. v. Trustees*, 409
4. Where both parties claim under a grant from the state, the question whether congress has jurisdiction is neither material nor pertinent. *Id.*, 409
- See RIPARIAN RIGHTS, 3.

Contempt.

The officers and managers of a savings bank petitioned the chancellor for an order directing them, among other things, to invest all moneys deposited in the bank, after a designated date, in certain specified securities. Loans of part of these deposits were afterwards made by the president, without the knowledge or subsequent approval of the other managers or finance committee, on the promissory notes of the borrowers, secured by collaterals other than those specified in the order. Other loans of part of these deposits were similarly made by the president, under an agreement with the borrowers, that the latter should retain a sufficient amount of "good securities" to cover these loans. The "good securities" never were, in fact, those stated in the order, and the borrowers for several years, and as long as the loan continued, had the custody of the box containing the "good securities" in their own vault, and the exclusive access thereto, and removed and changed the securities at pleasure.—*Held*, that this court had jurisdiction over the managers, and power to make the order; that the loans by the president were "investments," and a violation of the order, rendering him punishable for a contempt, even if the bank sustained no pecuniary loss therefrom; that the conduct of the other managers was not a contempt, although some of them knew, after the loans had been made, of

Contempt—Continued.

the kind of securities taken by the president, and had thus been negligent in the discharge of their duties. *Una v. Dodd*, 173

See APPEAL, 2; INJUNCTION; SPECIFIC PERFORMANCE, 5.

Contract.

It appearing that two sons had worked their father's farms, under an agreement that they should do so until they had accumulated for him a fund of \$12,000, and then they should have the farms free of rent during his life, and that the specified sum had been gathered about a year before the father's death, and thereafter the sons had enjoyed the use of the farms free until their father died—*Held*, that the sons had no reason to complain, on appeal, that the chancellor had made too small an allowance to them for services rendered under that contract. *Larison v. Polhemus*, 303

See FRAUD, 1, 4; HUSBAND AND WIFE, 2, 3; INTEREST; JURISDICTION, 2; SOLICITOR; SPECIFIC PERFORMANCE.

Corporation.

1. Where the trustees of a corporation gave a bond, secured by a mortgage on the corporate property, which, in strict legal effect, bound them individually, a court of equity will enjoin an action at law against them thereon, if it appears that there was no intention on their part to become personally liable. *Maps v. Cooper*, 316
 2. The complainants were incorporated, under a general statute, to supply Atlantic City, the defendant, with water. They afterwards contracted with the city for that purpose, and thereby accepted the provisions of certain ordinances regulating the mode of supplying the water, both for public and private purposes. They received in return exemption from municipal taxation, and also the exclusive privilege of furnishing water to the city and its inhabitants. They constructed their works at a large expense, and supplied the water, as required by their contract, satisfactorily.—*Held*, that, whether or not the city's grant of the exclusive privilege of furnishing water was *ultra vires*, and void as creating a monopoly, the city had exhausted its power as to providing a water supply; that the complainants' franchise was exclusive, and that consequently, this court would, by injunction, protect them against any invasion of their rights by persons laying water-pipes &c., under municipal authority, to compete with them unlawfully. *Atlantic City Water Works v. Atlantic City*, 367
 3. A railroad company may buy land in fee and hold it, and if the company becomes insolvent the property will be assets for the payment of its debts. *American Dock Co. v. Trustees*, 409
- See CONTEMPT; SALE, 4.

Costs.

1. The circumstances in this case prove a resulting trust in the defendants' deceased brother, whose heirs-at-law the defendants are. As there is no evidence that the answering defendant knew of the existence of the trust, he is entitled to his costs. *Third National Bank of New York v. Cary*, 25
 2. Two defendants in a partition suit put in separate and merely formal answers.—*Held*, that the fact that the answers were merely formal, and put in by the same solicitor, did not disentitle those defendants to the costs thereof. *Garwood v. Hartley*, 78
- See EXECUTORS, 4, 18, 19; PARTNERSHIP.

D.**Dedication.**

- Land dedicated for a highway does not, *ipso facto*, become a highway, and will not become so until the proper municipal authority has accepted it. *Booraem v. North Hudson County Railway Co.*, 465

Deed.

- See EVIDENCE, 4; EXECUTORS, 1; PARTIES, 2.

Devise and Legacy.

1. A testator provided as follows: "I give and bequeath to my dear, beloved wife, Rachel, about nine acres that is by south of Edo P. Mercellus's land called the new lane, and also all my movable personal property to be left to discharge my debts, and so much of my real property to discharge the remainder of my debts, if any wanting, and the remainder of my property, of what nature soever, during her widowhood. I give and bequeath to my daughter Caty the one equal fifth part of the remainder, and the rest to my two sons John and George, equal, share and share alike." The will was proved December 28th, 1822. In 1823, the widow married Adrian Van Houten, who died in 1825. She continued in the possession of the nine acres until her death, in 1863, and her executors, to whom she gave a testamentary power of sale, continued to possess the premises until the filing of this bill.—*Held*, that, aside from the widow's and her executors' possession of the premises for about sixty years, the will gave her a fee simple in the nine-acre lot. *Van Houten v. Post*, 51
2. Under this clause in a will, "I give and devise unto the lawful heirs of David Davis, \$500, to be paid to them by my executor when they shall arrive at the age of twenty-one years," David Davis being the son of the testator, and having, when the will was executed, three children, and when testator died, *four*, all of whom are now living, and two minors—*Held*, (1) That this gift was to the children of David Davis, as a class, and that each child who was living at testator's death took a vested interest; (2) that

Devise and Legacy—Continued.

each child is entitled to payment of its portion of the \$500, on attaining majority, but not to interest thereon from the time of testator's death, because, as grandfather, he did not stand *in loco parentis*; (3) that the legal construction of the word "heirs," in this clause, is not controlled or affected by another clause in the will, making a bequest to the "children" of testator's daughter. *Davis v. Davis*, 13

3. A testamentary trust of lands was to pay to the testator's wife and five children, in equal shares, the net rents thereof, and, after the death or remarriage of his wife, to the children, and in case of the death of any of the children leaving lawful issue, that child's share to be paid to such issue. The testator's wife died in his lifetime, and the five children all survived him. One daughter, Laura, married and died, leaving two children and four grandchildren, the children of her deceased son who died in her lifetime.—*Held*, that each one of Laura's surviving children took one-third of her interest under the trust and the four grandchildren of Laura's deceased son took the remaining third. *Ballentine v. De Camp*, 87

4. Legatees mentioned in a will by the nicknames by which testator always called them, and identified, were held entitled to their respective legacies. *Beatty v. Trustees*, 452
5. A provision that in case of the death of a certain legatee before majority, the legacy was "to revert back to" testator's "other lawful heirs," construed to mean that, in that event, the legacy should go to his children or their representatives. *Id.*, 452

See EXECUTORS, 15.

Distributions.

A non-resident testatrix gave all her estate to her husband for life, "and in the event of his decease, and not till then, to be divided between my step-children," John, William, Julia and James, "or their heirs." William died in the testatrix's lifetime, intestate, and having never been married. The property of the testatrix was all personal. By the statute of distributions of William's domicile, his father was entitled to his personal estate.—*Held*, that at testatrix's death, William's father became absolutely entitled to the estate in remainder given to William, notwithstanding the fact that he was, by the will, also entitled to a life estate therein. *Hard v. Turnure*, 121

Divorce.

1. A visit by a married woman to a brothel, will, unless satisfactorily explained, justify the presumption that she went there for a criminal purpose. *Cane v. Cane*, 148
2. Such conduct will not, however, afford evidence of guilt if it is

Divorce—*Continued.*

shown that the wife was decoyed there, by the procurement of her husband, and for the purpose of making a case against her. *Id.*, 148

3. A husband who seduces his wife before marriage, and, after marriage, sees her in a situation of temptation, and does nothing to rescue her, and she yields, will be understood as having consented to her adultery. *Id.*, 148

Domicile.

1. A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicile is not necessary. *Haral v. Haral*, 279
2. To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added *animus manendi*; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home. *Id.*, 279
3. By the laws of France, the marriage of a foreigner in France without any contract as to property, followed by the establishment of a conjugal domicile in that country, will subject the property of the married persons to the community law, and a government authorization under article XIII of the Code is not necessary to the establishment of such a domicile. *Id.*, 279
4. H., whose birthplace was in Connecticut, went to Europe in 1869, for the purpose of acquiring the German language, and completing his professional studies. In 1872 he went to Paris, where he remained; and, in February, 1877, married a French woman in Paris, without any contract as to property. Immediately after the marriage he rented a house at Suresnes, a village near Paris, for two years, and took up his residence there with his wife. In May, 1878, he was brought to this country, and sent to a hospital for the insane, at Philadelphia, where he died in 1881.—*Held*, that by his marriage in France, and the establishment of his conjugal domicile there, his personal property became subject to the community law, and that his widow, on his death, was entitled to the one-half part thereof, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others. *Id.*, 279

See DISTRIBUTIONS.

Dower.

1. The defendant claimed to be entitled to dower in the testator's real estate. On bill filed to quiet title—*Held*, that the proof showed

Dower—Continued.

that she was not his wife, and therefore it should be decreed that she was entitled to no dower, and must give up possession of the property in which he and she lived together at his death, and of which she continued to hold and claim possession as his widow.

Besson v. Gribble,

111

2. After directing that his debts be paid, and making a specific devise, a testator gave the "balance and residue" of his estate to his wife, declaring that that gift to her was in lieu of her dower. In the settlement of the estate, and the payment of testator's debts, all his personal estate was exhausted, and all his lands, other than those specifically devised, sold, by order of the orphans court.—*Held*, that his widow was not deprived of her right of dower in those other lands by her failure to file her dissent to the devise to her within the time limited by the statute. *Osmun v. Porter,* 241
3. A widow who has dower by the judgment of a court which cannot award her damages or compensation for mesne profits, may maintain a suit in equity for their recovery. *Shields v. Hunt,* 485
4. A widow whose dower has not been assigned, and who remains on the homestead farm of her husband, is entitled to the crops grown thereon after her husband's death. *Merchant's Case,* 506

E.

Easement.

An alley lying between two houses had been used for over forty years by the adjoining owners, for access to the rear of their houses, and to the lots behind and belonging thereto. Both houses were destroyed by fire.—*Held*, that the easement in the alley was not thereby lost, and that whether complainant had forfeited her right thereto by placing the foundation of her house in the alley, in rebuilding (the evidence thereof being conflicting), should be determined by an issue at law before she could enjoin the defendant from appropriating the part of the alley next to his lot in rebuilding. *Chew v. Cook,* 396

Eminent Domain.

A master was directed to ascertain and report the value of certain lands taken by a railroad company for its right of way, and the consequent damage to the owner's adjacent lands, as of the time when the company took the land.—*Held*, that the land covered by a public road, which was laid out through the land taken by the company, after the company had taken it, should not be excepted. *New York and Greenwood Lake R. R. Co. v. Stanley,* 361

Estoppel.

1. The complainant recovered a judgment at law against the defendant's brother for false imprisonment, and afterwards filed a cred-

Estoppel—*Continued.*

itor's bill to set aside, as fraudulent, two conveyances of lands by the brother to the defendant. The evidence showed satisfactorily that the lands in question, in fact, belonged to the defendant, although the legal title thereto had been in the name of his brother.—*Held*, that, as the cause of the action at law had been a tort, there was, against the defendant, no ground of estoppel such as sometimes exists where the cause of action is founded on a contract, and the credit has been given under the belief that the debtor was the true owner of the property, of which he had the legal title only, but not the equitable title. *Lillis v. Gallagher*,

93

2. The assignment of a mortgage was made in December, 1879. The mortgage was afterwards foreclosed, the premises bought by complainant's agent, and conveyed to the defendant in July, 1881. The complainant, who was then in Paris, was notified thereof in October, 1881, and returned to this state in April, 1882. He lived continuously thereafter, until April, 1883, with his agent, who informed him fully as to this transaction. He filed his bill in June, 1883.—*Held*, that his delay constituted a ratification and an estoppel as against defendant. *Chetwood v. Berrian*,

203

3. A mortgage for about \$1,500 was given to the defendant to secure a bond containing a warrant of attorney to confess judgment thereon. After it became due, and was, with the interest, unpaid, the defendant entered a judgment by confession on the bond, in the supreme court, and issued an execution thereon. The complainant, the mortgagor's brother, in order to aid him, conveyed with him to the defendant, pursuant to an agreement between the complainant and defendant, certain cedar swamps owned by him and his brother, and the consideration thereof was credited on the bond. He also, under the agreement, obtained from his brother a deed for the undivided one-half of another tract of land, likewise owned by them in common, and known as the Tin Shop Lot, on the brother's interest in which the judgment was a lien, and then gave the defendant a mortgage thereon for \$150, which complainant afterwards paid on account of the \$1,500 mortgage. Subsequently, the defendant foreclosed his \$1,500 mortgage, and after the sale there remained a deficiency.—*Held*, that under the circumstances the defendant should be enjoined (on the ground of equitable estoppel and waiver) from collecting this deficiency out of the Tin Shop Lot, which defendant now claims the right to do by virtue of his lien, under his execution on the confessed judgment, on complainant's brother's interest in the Tin Shop Lot before its conveyance to complainant. *Lewis v. Champion*,

350

4. An agreement among all the parties interested in an estate, whereby one obtained a discharge from her indebtedness to the

Estoppel—Continued.

estate, and another received payment from the estate for services to the testator, estops the former from excepting to the executor's account because of such payment. *Kinman v. Wight*, 501

5. The holder of a decree against an insolvent railway corporation who, as director of a new corporation, with full knowledge, consents to the subsequent acceptance of a deed from a receiver to it, free from all encumbrances, under the statute, and votes to execute a mortgage for the security of bond-holders, which shall be a first lien—*Held*, not entitled, on petition, to execution and sale of land of the company, with priority. *Freehold and New York Railway Co. v. Hodgson*, 518

See AGENCY; ARBITRATION; FRAUD, 3.

Evidence.

1. On a bill by the alleged vendee against an administrator *cum testamento annexo*, for the specific performance of a contract for the sale of lands alleged to have been made by the executor, who had a testamentary power of sale, the vendee is incompetent to prove the contract. *Palmateer v. Tilton*, 40
2. The complainant was, by a decree of this court, declared to be of unsound mind, and he appears in this suit (to foreclose a mortgage held by him) by guardians of his person and estate duly appointed. The defendant set up usury as a defence, and at the examination offered himself as a witness to prove it.—*Held*, that complainant (and not his guardians "suing in a representative capacity") was the real party to the suit, and being under a "legal disability," within the meaning of the statute, the defendant was incompetent as a witness, and the examiner should, under the 218th Rule, have rejected him. *Demarest v. Vandenberg*, 130
3. An executrix (the wife) was held incompetent to prove the gift of a chattel by her husband to her, which she claimed as her own. It did not appear that any objection was made to her testimony. There was a minor interested who was not represented in the case.—*Held*, that her testimony should be disregarded, although the record did not show that objection to her competency was made at the time she offered herself as a witness. *Sherman v. Lanier*, 249
4. A statute provided that any lands of the state under tide-water, or that might theretofore have been under tide-water, which should happen to come within the location of the route, or of the depots, stations or other works of a certain railroad company, or which should be needed therefor, should be paid for by the company to the trustees of the school fund of the state; that the boundaries and price thereof should be fixed by the riparian commissioners; that the price should be paid prior to any filling or improvement

Evidence—*Continued.*

- thereon authorized by the act, and that on such payment the title to the land should vest in the company in fee, and that a deed therefor might be made by the riparian commissioners, governor and attorney-general, in the name and under the great seal of the state.—*Held*, that on the trial of an action of ejectment, a deed under the great seal of the state, purporting to convey land of the state in pursuance of the statute, was, of itself, competent evidence, without proof that the previous steps leading to the vesting of the title had been taken when the deed was made. *American Dock Co. v. Trustees for the Support of Public Schools*, 409
5. Also, that evidence offered by the defendants in the action to show that the lands conveyed by the deed did not come within the location of the road or of the depots, stations or other works of the company, was properly excluded. *Id.*, 409
6. The administrator of a married woman paid a bill presented by a physician against the estate, and her husband excepted to its allowance in the settlement of the administrator's account.—*Held*, that the physician was incompetent to testify to a promise by the decedent to pay the bill. *Baker v. Galpin*, 491
7. On a bill filed by a wife for moneys received for her by her husband, she cannot be a witness to prove the admissions of her husband. *Gray v. Gray*, 511
- See AGENCY; ATTORNEY; FRAUD, 1; MORTGAGE, 5; PRACTICE, 3.

Executors and Administrators.

1. A testatrix obtained a decree in a foreclosure suit, and the execution thereon was, by direction of her solicitor, returned unexecuted. After her death an *alias* execution was issued in her name, and, at the sheriff's sale, one of her executors bought the premises, taking the title in his own name for convenience, and in trust for the estate.—*Held*, that a deed executed by himself and his wife, and his co-executor, would transfer a good title to the premises. *Banta v. Board of Trustees of School District No. 3*, 123
2. After the account of two administrators, allowing commissions in a gross sum to both, had been passed, one of them, alleging that his co-administrator had possessed himself of all of the commissions, filed a petition in the orphans court to compel his co-administrator to pay him one-half thereof.—*Held*, that the orphans court had no jurisdiction to grant the order. *Mount v. Slack*, 230
3. An executrix and trustee, in good faith, loaned money of the estate, with some of her own, on the borrower's promissory note, secured by a policy of insurance on his own life. He failed to pay the subsequent premiums, and she afterwards surrendered the policy for a paid-up one of one-fourth the amount of the original, the borrower being insolvent.—*Held*, that she was personally

Executors and Administrators—Continued.

- liable to the estate for the full amount of the loss. *Sherman v. Lanier*, 249
4. A trustee invested \$10,000 of the estate in a mortgage on lands then worth \$20,000. The lands were subject to a municipal assessment of \$9,000, which was afterwards paid by the mortgagor, then a man of large means; he subsequently became insolvent, and she took from him a deed for the land, and delivered his bond to him. The assessment was afterwards set aside, the amount refunded to him, and the premises re-assessed, in her hands, for \$2,600. After her removal as trustee, she, under the order of the orphans court, conveyed the premises to her successor.—*Held*, that as no actual loss had been sustained by the estate, she could not be charged with the \$10,000, on the ground that the investment, when made, was, in fact (considering the assessment as a first lien), a second mortgage; and further, that the orphans court, while it could remove her for failure to give bond after her remarriage, had no power to order her successor to reconvey the premises to her on her paying the \$10,000, or to order him to sell the premises, and credit her with the net proceeds, the remedy, in a proper case, being in chancery; besides, if the property should eventually prove to be worth more than the investment, the *cestuis que trust* would be entitled to the benefit of it. Nor, if it were conceded, would the fact that she personally received a large *bonus* for making the investment, of itself, establish bad faith on her part in making the loan, although, if shown, she would be accountable to the estate for the *bonus*. She should be required to pay costs in the orphans court only on those of her exceptions to the master's report which were not sustained. *Id.*, 249
 5. Where executors were not chargeable with the deficiencies arising from the foreclosure and sale of premises under mortgages belonging to the estate, they were allowed therefor in their final account, they having been charged with the full amount of those mortgages in their first account. *Dey v. Codman*, 258
 6. *Held, also*, that they were not chargeable with the amount of a mortgage which was satisfied during their testator's lifetime, but canceled of record by them after his death. *Id.*, 258
 7. They were allowed for taxes paid and for repairs and improvements made on the testator's homestead after his widow ceased to reside therein. By the terms of the will, the executors held it in trust for her and her daughters to live there while they were unmarried, for their natural lives, with a provision that they might sell in certain contingencies, which power was not exercised until ten years after the widow's death.—*Held, also*, that the widow should have paid the taxes and costs of repairs and improvements while occupying it, and also after she ceased to occupy it, but received the rents therefrom. *Id.*, 258

Executors and Administrators—Continued.

8. They were allowed for traveling expenses actually incurred and paid by them, and also the amount of a salary paid to an agent employed by them about the business of the estate, such amount having been taken into consideration in fixing their commissions. *Id.*, 258
9. They were allowed for payments of certain municipal assessments levied on lands of the estate, although the statute under which similar assessments were laid was afterwards declared by the courts to be unconstitutional; and also for other municipal assessments subsequently paid by them in good faith and with discretion. *Id.*, 258
10. They were held not liable for refusing an offer of \$30,000 for certain lots of the estate which had been valued by a reputable local expert at \$95,000, and shortly afterwards, at their request, with a view to fixing a price which would invite buyers, at \$65,000, although the lots were afterwards, in order to close the estate and to pay certain assessments thereon which the estate had no funds in hand to pay, bought in at public sale for \$1,470, under an agreement by all those interested (including the executors) except the appellant, whose interest is one thirty-second part. The agreement was to sell for the best price obtainable, and if one R. should buy he should hold the lands in trust, to be divided among the parties. The sale was extensively advertised and R. was the successful bidder, and the lots were divided accordingly. The value of all lands greatly depreciated by the panic of 1873, after the \$30,000 were offered for the lots.—*Held, also*, that they were not liable for a loss sustained on a sale of the homestead through the same causes, its value being also affected by the existence of the testator's surviving daughters' contingent right to occupy it. *Id.*, 258
11. They were allowed for the payment of a commission of \$300 to a broker who secured a purchaser for them of part of the testator's lands for \$15,000. *Id.*, 258
12. They were held not liable for the non-collection of deficiencies on the sale of mortgaged lands, there being no proof that those deficiencies could in any case have been collected. *Id.*, 258
13. They were allowed for counsel fees paid, where the services appeared to have been necessary and probably rendered. The question for the allowance for some of those professional services had been considered by the orphans court, when a former account was passed, and they were then allowed. *Id.*, 258
14. The entire amount of the cash on hand at the settlement of the first account was charged to them in the second account as cash on hand, without deducting therefrom the amount of the commissions due them as fixed by the court, and also the surrogate's

Executors and Administrators—Continued.

- fees on the first account. The second account was rectified by making those deductions. *Id.*, 258
15. A testator gave to his housekeeper \$1,000, absolutely, and the interest on \$8,000 during her lifetime. She had occupied the position of housekeeper in his family for twenty years or more. She presented to the executors a claim for \$3,000 and interest (*i. e.*, \$500 a year for the preceding six years) for her services to the testator.—*Held*, that the executors, in the exercise of good faith and discretion, were justified, after she had threatened to bring suit on her claim, in compromising it for \$3,000; that the testamentary gifts to her were not in satisfaction of her claim for services, and that a mere notice, given by the residuary legatees to the executors not to pay her claim, was not sufficient to prevent the executors from compromising it. *Rogers v. Hand*, 270
16. A commission of three and a half per cent. on \$289,000 was approved, in a case where the executors had been compelled to carry on litigation; to investigate and ascertain exactly what land the testator owned, and to exercise a testamentary power to sell it. *Id.*, 270
17. The orphans court has the power to open a decree settling an intermediate account of trustees, in which it appears that commissions were allowed in excess of the sum fixed by the statute. *Jackson v. Reynolds*, 313
18. Executors' reasonable expenses of a suit in this court for the construction of a will, allowed, but not those in the court of appeals in the same case, the appeal therein having been taken by them, and being deemed unnecessary under the circumstances. *Beatty v. Trustees*, 452
19. Executors, who instituted proceedings to be relieved from the amount charged against them in their final account, and who were refused relief therefrom, held liable to pay the costs of the suit, although they also asked incidentally for a construction of the will by the same bill. *Id.*, 452
20. Executors were directed to convert and invest the residuary estate, and to divide it when the testator's youngest child should have attained its majority, and also thereafter to hold testator's daughters' shares during their lifetime. They sold the real estate which constituted part of the residue.—*Held*, that they were entitled, as executors, to commissions on the proceeds of the sale, and that they would also be entitled, as trustees, to another commission thereon, for the services they might render as such in reference thereto. *Baker v. Johnston*, 493
21. An executor may pay any claim against the estate, which he is satisfied is just, without requiring a statement of the items thereof, or that it be sworn to. *Kinman v. Wight*, 501

Executors and Administrators—Continued.

22. Administrators held to account for lambs, the produce of sheep belonging to the estate, born after the intestate's death, and for the wool shorn from the sheep after his death, and also for the net proceeds of the sale of milk from his cows. *Merchant's Case*, 506
- See ACCIDENT, 3; ESTOPPEL, 4; EVIDENCE, 1; JURISDICTION, 3; SALE, 4.

F.**Fraud.**

1. Where a contract is made by parties holding confidential relations (a husband and wife), so that it is probable that they did not deal on terms of equality, but that unfair advantage might have been taken by the stronger party of the weaker, there the burden, if the contract is assailed, rests on the stronger party to show that no advantage was taken, otherwise fraud will be presumed. *Farmer v. Farmer*, 211
 2. A false representation, to be the proper subject of judicial action or cognizance, must be the cause of legal wrong or injury, and such cannot be the effect of a false representation made to a person who knows it to be false. *Parker v. Hayes*, 469
 3. If an infant, being entitled to a sum of money on attaining twenty-one years of age, induces his trustee to pay it to him in advance of that time by fraudulently representing himself to be older than he is in fact, he will, in equity, be bound by the payment, but only to the extent of the payment actually made. If the trustee induces the infant to release the whole, on paying only a part of what is due him, the release will only be held good to the extent of the payment made. *Id.*, 469
 4. When stipulations are kept out of a contract by fraud, such contract will be reformed in equity, and specifically performed. *Cubberly v. Cubberly*, 514
- See ACCIDENT, 1; AGENCY; PLEADING; SALE.

Fraudulent Conveyance.

When a debtor made a conveyance, fraudulent as to creditors, to his son, taking from him at the same time a mortgage to secure certain trust-moneys in his hands, a court of equity, in setting aside such conveyance on a creditor's bill, will validate the mortgage in behalf of the *cestuis que trust*. *First National Bank of Clinton v. Cummins*, 577

See ESTOPPEL, 1.

G.**Guardian and Ward.**

1. The defendants' intestate was appointed general guardian of complainant, his granddaughter, in February, 1865, and special

Guardian and Ward—Continued.

guardian to sell some of her lands in July, 1865, and he gave sureties in each capacity. He sold those lands, but never rendered any account of the proceeds, nor of his disposition thereof, after his report of the investment thereof, made soon after they came to his hands, and never filed any account as general or special guardian. His ward, who was born in 1863, always lived with him thereafter. He died insolvent in 1881. On exceptions to a master's report as to the allowances to and charges by the guardian, and as to his sureties' respective liabilities—*Held*, that the cost of furniture purchased for and used by the ward should be allowed; that the time when she was absent from his house during her school vacation should be deducted from his charge for board; that he should be charged with the amount of rent he would have received from the ward's house if he had kept it in tenantable condition; that the report of the sale (not carried out) of that property, signed by him, although never filed, was competent evidence as to the terms &c. of that sale to charge him with rent for the property; that he should be charged with interest annually on the amounts originally received by him as general guardian, and interest on the rents, but the proceeds of the sale of the lands should not be included therein, nor the interest on those proceeds, because, for them, his sureties as special guardian are solely responsible, since he never obtained any direction from the court to transfer those proceeds to his account as general guardian. The proper credits for board, clothing, pin-money, wages of a nurse, and for taxes, under the circumstances, fixed.—*Held, also*, that the special guardianship fund is entitled to no part of the allowance for board, clothing &c., unless the amount of those allowances should prove greater than the debits of the general account, in which event the excess should be credited on the account of the special guardianship. *Smith v. Gummere*,

27

2. A guardian received pension-money quarter-yearly for nine years on account of his ward. He never filed any account from the time of his appointment, fifteen years ago, until cited.—*Held*, that although there was no evidence that he had used the money, he must pay interest on the pension-money, with annual rests; that he was not entitled to commissions, nor to any allowance for the maintenance of the ward (whose mother he married when the ward was four years old) while the ward continued to live in his family and until the mother's death, but that he should be allowed for board paid to third persons thereafter. *Dissinger's Case*,

227

3. The general guardian of an infant was also appointed its special guardian to sell certain lands, and gave different bondsmen in each capacity. From his imperfect mode of keeping his accounts, it is impossible to tell now which of the two funds

Guardian and Ward—Continued.

should be credited with a certain investment. In a litigation, after his death and insolvency, between the ward and the sureties upon his respective bonds—*Held*, that each fund should be credited with one-half of the amount of the investment. *Smith v. Gummere*,

394

See EVIDENCE, 2.

H.**Husband and Wife.**

1. A decedent left no property, except a lot with an unfinished house thereon, which his widow occupied for about three months after his death, and then leased, and received the rent. In a suit by the children for partition thereof—*Held*, that she was entitled to re-imbursement of moneys paid by her for taxes thereon, and also for repairs of damage to the house by a tempest, but not for the premiums on insurance policies taken in her own name, and that she must account for the rents. *Houston v. Houston*, 146
2. The legislation of this state, enlarging the capacity of a married woman to acquire and dispose of property, does not give her capacity to make a legal contract with her husband. *Farmer v. Farmer*, 211
3. A wife may bestow her property, by gift, on her husband, or she may make a contract with him which will be upheld in equity, but the courts always examine such transactions with an anxious watchfulness and dread of undue influence. *Id.*, 211
4. Under the laws of France, by a marriage without a contract as to property, a community of property between the husband and wife is established as an incident of the marriage. During coverture the husband has the control and management of the community property, and he may dispose of his share of the common property by his will; but the wife's share—that is, the one-half of the community property—the husband cannot dispose of, and she will be entitled to it on his death. *Harral v. Harral*, 279
5. A son advanced money to his mother for her support during her life, under an agreement that he should be repaid at her death out of her estate. The son procured from his wife the money advanced, agreeing that she should have the account against his mother. Equity will enforce the claim in behalf of the wife. *Titus v. Hoagland*, 294
6. The parol assignment to the wife being unknown to the mother, a counter claim which she had against her son at her death will be set off against this claim of the wife. *Id.*, 294

See ATTORNEY; DIVORCE; DOMICILE, 3, 4; DOWER; EVIDENCE, 3, 7; FRAUD, 1; LIMITATION OF ACTIONS; TRUST, 3; UNDUE INFLUENCE, 2.

I.

Infant.

See FRAUD, 3; GUARDIAN; PARENT AND CHILD; TRUSTS, 4.

Injunction.

A statute of 1876 authorized the appointment of deputy county clerks, but provided that they should receive no salaries from their respective counties. A statute of 1882 directed that in all counties where the county clerks were then paid by annual salary, the deputy clerk should receive an annual salary of \$2,000, payable quarterly. A bill was filed by some tax-payers and citizens of Camden county, alleging that the statute of 1882 was unconstitutional, and thereupon an injunction was issued, restraining the county collector from paying, and the defendant from receiving, as deputy county clerk, any salary thereunder. Pending the suit, the board of freeholders passed a resolution appropriating \$160 per month to the defendant for his services in the county clerk's office from the time the bill was filed and injunction issued.—*Held*, that, although the board of freeholders were not parties to this suit, the payment of the money by the county collector, and its reception by the defendant, were palpable violations of the injunction. *Gibbs v. Morgan*,

79

See ACCIDENT, 2; CORPORATION, 1, 2; EASEMENT; SPECIFIC PERFORMANCE, 4.

Insanity.

See EVIDENCE, 2; WILLS.

Insurance.

A policy of insurance issued in the name of the agent of the owner of the vessel insured, instead of in the name of the principal, through the mistake of the insurance company's agent in preparing the application for the policy, without any representation or mistake of the owner or applicant for such insurance, may be rectified after the loss of the vessel, the act of the company's agent in such case being that of the company and not of the insured, notwithstanding the fact that he signed the application with his own name "for applicant." *Hill v. Millville Mutual Marine and Fire Insurance Co*,

66

See HUSBAND AND WIFE, 1; MORTGAGE, 5; TRUSTS, 4.

Interest.

An oral agreement to reduce the rate of interest on a mortgage from seven to six per cent., and to pay it semi-annually instead of annually, made after the mortgage became due, is valid. *Sharp v. Wyckoff*,

376

See DEVISE, 2; GUARDIAN, 2.

Issue at Law.

Where the facts are undisputed, and the cause is to be decided upon mere questions of law, it is not error for the court to direct the jury what verdict to find. *American Dock Co. v. Trustees*, 409
 See EASEMENT; PRACTICE, 5.

J.**Judicial Sale.**

By the terms of a foreclosure sale the purchaser was required to pay ten per cent. of the purchase-money at the close of the sale, and if he should not complete his purchase, the premises would be offered for sale again, and the defaulting purchaser should not be benefited by any advance in price at such second sale, but liable for all loss and expense occasioned thereby. A purchaser of the premises for \$9,900 paid the ten per cent., but did not pay the balance of the purchase-money, and the premises bought by him were resold by the sheriff, and brought \$10,500.—*Held*, that he was entitled to the ten per cent. deposited by him. *Chancellor v. Gummere*, 582

Jurisdiction.

1. Where a sale of lands under a municipal assessment is absolutely void, because made after the time limited by law for the continuance of the lien of the assessment on the premises, this court has no authority, on a bill *quia timet*, to order the complainant to pay the assessment; neither can it correct it, nor declare it a lien on the premises, under the statute providing that such assessments shall not be set aside for irregularities or defects in form &c. *Field v. West Orange*, 60
2. The complainant made a contract with the receiver of a railroad (the defendant's predecessor) to remove the coal, ashes and cinders from a specified ash-pit on the railroad, and to have therefor the coal, ashes and cinders so removed. He alleges that the former receiver refused to allow him to perform the contract, and that he thereby sustained great damage.—*Held*, on demurrer, that this court would entertain jurisdiction of the suit, on the ground that the contract having been made with a former receiver, the present receiver (the defendant) cannot be sued thereon at law, and the claim is against the trust funds of the railroad company, which are still under the control of this court. *Kerr v. Little*, 83
3. Where an executor has, by retainer, satisfied his own claim against the estate, the orphans court, in passing his account, has jurisdiction to inquire into the validity of the claim, and the legality of his action in retaining therefor. *Kinman v. Wight*, 501
4. A firm owning, as partnership property, real estate, was dissolved by the death of one of the two partners. The settlement of the

Jurisdiction—Continued.

partnership affairs was proceeding in the court of chancery in a suit pending between the surviving partner and the executrix of the deceased partner, who had, by his will, acquired his interest. Under such circumstances, the parties entered into a written contract for the sale of all the real estate to the executrix, who was to pay for it by procuring releases of some mortgages which encumbered it, and by also depositing in court \$30,000, to be disposed of in the settlement. The executrix failed to perform her part of the contract, and the mortgages having been foreclosed, a sale under a decree of foreclosure divested the interest of the parties and rendered specific performance of the contract impossible. The surviving partner filed a supplemental bill by leave of court, praying that the losses sustained by the partnership estate by the breach of the contract, should be ascertained and decreed to be paid or accounted for by the executrix.—*Held*,

(1) Whether the relief asked is, under such circumstances, within the jurisdiction of a court of equity, not decided.

(2) If the court has jurisdiction, the relief should be granted under the same rules which are applicable to the granting of relief by way of specific performance, and if he who seeks relief was unable to perform the contract on his part, or his conduct in the transaction was wanting in fairness and equity, the relief should be denied.

(3) In this case the contract could not have been performed by the surviving partner, according to its terms, and his conduct respecting it was so inequitable as to justify the refusal of the relief he sought. *Ludlum v. Buckingham*,

563

See CONSTITUTION, 4; CONTEMPT; DOWER, 3; EXECUTORS, 2, 17; LANDLORD AND TENANT.

L.**Landlord and Tenant.**

A landlord, by a mere oral agreement, rented a hotel to a tenant, in 1867, with a stipulation that if he should enlarge the hotel the tenant would pay him a specified additional rent, and that the tenant should also have the privilege of purchasing the premises at cost. The tenant entered and occupied the demised lands, and the landlord and tenant both made valuable additions thereto. The landlord died in 1876, and the tenant in 1879. Pending litigation in another state over the landlord's will, the defendant was appointed by this court a receiver of the premises; and a few months prior to the tenant's death, he (the tenant) made an assignment to the complainant for the benefit of his creditors. On a bill alleging these facts, and that the estate of the landlord is indebted to complainant for board &c. furnished the landlord and his family, and that the accounts between the parties are

Landlord and Tenant—Continued.

complicated, and the items numerous—*Held*, (1) that this court would entertain jurisdiction of the matter; (2) that the statute of limitations, under the circumstances, was not a defence on the part of the landlord or his representatives; (3) that the cost of improvements to the premises, made by the tenant, could not be included in this accounting. *Woolley v. Osborne*,

54

See HUSBAND AND WIFE, 1.

Limitation of Actions.

Quere. As to the application of the statute of limitations to a debt due from a husband to his wife. *Gray v. Gray*,

511

See LANDLORD AND TENANT.

M.**Maxims.**

"Equality is equity," 396

"Ignorantia juris haud excusat," 558

"Nemo debet locupletari ex alterius incommodo," 450

"Qui tacet consentire videtur, qui potest et debet vetare, jubet si non vetat," 359

"Quod non apparet non est," 124

Mistake.

See ACCIDENT.

Mortgage.

1. A mortgage of \$1,000 was foreclosed, but through the mistake of the complainant's solicitor a subsequent judgment creditor was not made a party. By an agreement between the owner of the equity of redemption (which was subject to the charge of a life estate and legacies amounting to \$1,750, all of which were paramount to the judgment) and the mortgagee, the latter purchased the premises at the foreclosure sale and transferred his bid to the owner of the equity of redemption, and at the same time advanced to him another \$1,000, for which he received a mortgage of \$2,000, including his old mortgage, on the same premises. The owner of the life estate and the legatees released their respective interests in the premises, taking therefor mortgages subsequent to complainant's \$2,000 mortgage. The additional \$1,000 was expended in paying off the principal and interest of encumbrances prior to the \$1,000 mortgage, and taxes on the premises then due.—*Held*, that the judgment did not, through the solicitor's mistake in omitting it from the foreclosure, become a lien on the premises prior to the \$1,000, but the latter must still be treated as an existing encumbrance, and the complainant entitled to an account of the moneys due to him thereon, and of all moneys paid by him or any subsequent grantee for taxes and necessary repairs

Mortgage—Continued.

on the premises, as well as for the liquidation of any encumbrances thereon prior in lien to the judgment; and, on the other hand, complainant must account for all rents and profits received by his grantee or those claiming under him since the delivery of the sheriff's deed under the foreclosure of the \$1,000 mortgage.

Van Dwyne v. Shann,

6

2. The presumption is, that the mortgage first recorded is the first lien; and to overcome such presumption, it must be proved that the mortgagee of the mortgage first of record, at or before the time he took his mortgage, had knowledge of the existence of the mortgage first in date. *Hendrickson v. Woolley,* 307
3. The notice, if any, must be taken with the qualifications attached to it by the agreement of the mortgagee of the unrecorded mortgage; and if such mortgagee has agreed with the mortgagor to keep his mortgage off the record, in order that the mortgagor may borrow more money on the property to be secured prior to such mortgage, and such agreement be made known to the mortgagee of the mortgage second in date, but first of record, at or before its execution, such notice will not give the unrecorded mortgage priority. *Id.,* 307
4. In such case the priority of the mortgage first in date is waived. *Id.,* 307
5. A mortgage on leasehold lands contained a provision that the mortgagor would insure the buildings thereon, and assign the policies to the mortgagee, or that the latter might, in the event of the mortgagor's failure to do so, effect the insurance, and the premium thereon be a lien under the mortgage. There was another provision that if the interest on the mortgage should not be paid for thirty days after it became due, the principal should, at the mortgagee's option, become payable. Nearly five months elapsed after the mortgage had been given before the mortgagor, although frequently requested to do so, procured the policies (they were never delivered to the mortgagee), and after waiting so long the mortgagee insured the premises. The mortgagor and his wife testified that, by a verbal agreement made before the mortgage was executed, the first installment of interest was to be paid out of certain rents then due. This installment was never paid.—*Held,* that the cost of the insurance was a charge on the premises, and collectible under the mortgage, and that the evidence as to the verbal agreement about the interest was inadmissible. *Neale v. Albertson,* 382
6. A mortgagee, having recovered in a court for the trial of small causes a judgment against the mortgagor for a debt other than the mortgage debt, docketed the judgment in the common pleas, and at a sheriff's sale under execution from the pleas bid in the mortgaged premises, believing that she was purchasing a good

Mortgage—*Continued.*

title thereby. The mortgagor, believing that the mortgagee had thereby secured an absolute title, surrendered possession to her, and thereafter the mortgagee, with the knowledge of and without objection from the mortgagor, used the property as her own, and placed substantial and permanent improvements thereon. Subsequently, the mortgagor discovered that the constable's return to the execution from the trial court was so defective as to render the docketing and sheriff's sale illegal and void, and thereupon filed a bill to redeem.—*Held*, that she must pay the mortgagee the value of the improvements. *Freiknecht v. Meyer*,

551

See EXECUTORS, 4, 5, 6, 12; INTEREST; PARTIES, 3.

N.**Names.**

See DEVISE, 4.

Negligence.

See ACCIDENT, 3; CONTEMPT.

Notice.

See APPEAL, 2; EXECUTORS, 15; MORTGAGE, 2, 3; PRACTICE, 4; TENDER.

No Exeat.

See PRACTICE, 1, 2.

Nuisance.

1. The former owner of a hotel in Trenton applied to the common council of the city, and obtained, by ordinance, permission to lay a drain and sewer-pipe from the hotel through a street to a small natural stream of water. The ordinance contained a provision that if such pipe should become a nuisance (upon which the opinion of the common council should be final and conclusive), the owner, his heirs or assigns, would remove it. The hotel is now owned by one of the defendants, the other being his lessee. The board of health of the city of Trenton filed a bill, in the name of the state, to enjoin the use of the pipe for discharging the filth of the hotel into the stream, as a nuisance detrimental to public health; and the evidence shows that its use is a public nuisance.—*Held*, that the injunction should be allowed, although other persons also discharged their filth into the stream; and although the statutory requisites as to the organization of boards of health had not been strictly complied with by complainants; and although the ordinance had never been repealed, and the defendants insist that the license thereby granted is in the nature of a contract and irrepealable. *Board of Health of the City of Trenton v. Hutchinson*,

218

Nuisance—Continued.

2. No power exists in the common council of Trenton, under its charter, to license an individual to lay a private sewer in public streets, or to discharge filth into an open watercourse not a public sewer. One who thus uses a private sewer laid under permission of an ordinance of the council cannot claim to be exempted from proceedings to abate or restrain a public nuisance created thereby, on the ground that such use is an act authorized to be done by public authority. *Hutchinson v. Board of Health of the City of Trenton*, 569.
 3. A board of health organized under the "Act concerning the protection of the public health, and the record of vital facts and statistics relating thereto," approved March 11th, 1880 (*P. L. of 1880 p. 206*), may file a bill in the court of chancery as relators, in the name of the state, for an injunction to restrain the continuance of any nuisance hazardous to the public health of the locality. In this respect the remedy to restrain such a nuisance, which formerly was required to be in the name and at the instance of the attorney-general, has been extended so that a proceeding in equity for an injunction may be taken by such a board. *Id.*, 569.
- See PLEADING, 3; WATER-RIGHTS, 2.

P.**Parent and Child.**

See DEVISE, 2; GUARDIAN, 2; INFANT; TRUSTS, 3.

Parties.

1. The defendant recovered from an insurance company the amount of a policy on her husband's life. The complainant was her solicitor in that suit. The insurance company paid the complainant, by its check, the amount of the taxed costs in the suit, and gave him also another check, certified by the bank on which it was drawn, for the amount due defendant, and drawn payable to her order. In a controversy between her and her solicitor over his share of the proceeds of the latter check—*Held*, that a demurrer, on account of his having made the insurance company a defendant, should be allowed. *Hassell v. Van Houten*, 113.
2. The evidence in this case clearly established the complainant's right to redeem part of certain land, under an agreement with the defendant to attend a sheriff's sale thereof under foreclosure, and to bid it in for complainant's benefit. Part of the land was conveyed by the sheriff's grantee to a railroad company, by a deed which had not been recorded when the bill was filed.—*Held*, that the seventy-eighth section of the chancery act (*Rev. p. 118*) applied to the case, and that the suit, therefore, was not defective for want of parties. *Eckerson v. McCulloh*, 115.

Parties—Continued.

3. In a litigation in this court over a bond and mortgage made to A in trust for B, the complainant was appointed the receiver thereof, with authority to collect the money due thereon and distribute it among C, D and E. In a subsequent foreclosure suit upon the mortgage by the receiver—*Held*, on demurrer, that A, B, C, D and E were not, nor was any of them, necessary parties. *Applegate v. Tyson*, 365
 4. Where a bill filed by trustees seeks the sale of real estate vested in them in trust, and they have not a present absolute power of disposition over their estate, according to the terms of the trust, their *cestuis que trust* are necessary parties to the suit. *Smith v. Gaines*, 545
- See* BANKRUPTCY; MORTGAGE, 1; NUISANCE, 3.

Partition.

- Upon a bill for partition among remaindermen, the consent of the owner of the particular estate in possession is requisite, and if a sale be ordered it must be a sale of the whole estate, as well that in possession as that in expectancy. *Id.*, 545
- See* COSTS, 2.

Partnership.

- A surviving partner who, in good faith and under an honest belief that he had a good defence, resists, by litigation, but unsuccessfully, the collection of a claim against the partnership estate, will be entitled to contribution for the reasonable expenses of the litigation as part of the expenses of winding up the partnership affairs. *Lee v. Dolan*, 193
- See* JURISDICTION, 3.

Pleading.

1. To a bill to foreclose a first mortgage, the holders of the second and third mortgages on the premises were made defendants; also the wife of the mortgagor, who held the fourth mortgage thereon, and also the assignee for the benefit of creditors under an assignment by the mortgagor. The answers of the second and third mortgagees set up fraud in the consideration of the fourth mortgage, but before this matter had been fully inquired into, all the parties entered into a written agreement that the premises should be sold, saving all questions of priority &c. The second and third mortgagees had no interest in the validity of the fourth mortgage, and had set up their objection thereto by answer instead of by cross-bill, as the practice then required. The assignee for the benefit of the mortgagor's creditors having been misled by those answers and by his expectation that the *bona fides* of the fourth mortgage could be investigated thereunder, was afterwards

Pleading—Continued.

- allowed to file an answer in the nature of a cross-bill, attacking the fourth mortgage for fraud therein. *Smock v. Jones*, 16
2. On a general demurrer to a bill, the decree of the chancellor in favor of the demurrer was reversed by the court of appeals, but a part of his decision, as expressed in his opinion, was approved. —*Held*, that, after the decree of the court of appeals had been remitted to this court, the defendants could apply, under the two hundred and fifteenth rule, and have stricken out of the bill so much thereof as was held to be objectionable by that part of the decision sustained by the court of appeals; such proceeding being tantamount to an amendment of the original demurrer. *Kirkpatrick v. Corning*, 22
3. Complainant filed a bill to restrain defendant from continuing a nuisance of nauseous and noisome odors from its gas works, causing injury and discomfort to him and his family, dwelling in his house opposite the defendant's works. The defendant answered, stating the origin of the company, and its acts under its corporate powers, its acquisition of the land whereon its works are erected, the natural condition and the improvement of that land, the former condition of complainant's property, the great cost of constructing its works, and the irreparable injury that would result from an injunction preventing its manufacturing gas.—*Held*, on motion, that these averments were not responsive, but impertinent and irrelevant, and must be stricken out. The formal clauses required by the two hundred and fourteenth rule to be omitted from answers, having been inserted by the defendant, were also stricken out. *Crammer v. Atlantic City Gas and Water Co.*, 76
4. The complainant seeks to redeem certain real estate sold under foreclosure in this court, on equitable terms. All the defendants, except Alice Buckingham and her husband and Susan Horner, demurred to the bill for want of equity. Their demurrer was sustained in this court, but the decree of this court was reversed by the court of errors and appeals, where it was held, as this court had held, that the decree in the foreclosure suit was conclusive on the complainant; but that court held further that complainant might be entitled to relief on the ground of fraud in the sale under that foreclosure. Afterwards, all of the bill, excepting the part relating to that fraud, was stricken out. The defendant Alice Buckingham, who has already answered, now moves for leave to file an amended answer by way of cross-bill against certain of her co-defendants, to obtain the relief which it has been held in this case the complainant cannot himself obtain. The original bill neither asks for any relief against her, nor can any be thereby obtained against her.—*Held*, that the application must be refused. A cross-bill is considered as a mode of defence, and must be confined to the subject of the litigation in the origi-

Pleading—Continued.

nal suit, and cannot be the means of instituting a distinct suit in relation to other matters, and cannot become the foundation of a decree as to such matters. *Kirkpatrick v. Corning*,

136

5. A bill to redeem alleged that the defendant was a mortgagee in possession; that the complainant was the owner of the equity of redemption and was ready to pay the mortgage debt. The answer alleged that the defendant had become the owner of the absolute title by purchasing the complainant's equity of redemption under a justice's court judgment against the complainant, docketed in the common pleas. The complainant filed a general replication. —*Held*, that the question whether the title, under the docketed judgment, was valid or void on its face, was properly put in issue. *Freicknecht v. Meyer*,

551

See VARIANCE.

Possession.

Complainants and those under whom they claimed had had fifty years' open notorious and continuous possession of lands, under duly recorded deeds purporting to convey the entire estate therein.—*Held*, that their title was valid, as against one claiming under the former owner of an undivided interest. *Watson v. Jeffrey*,

62

See DEVISE, 1; PARTITION.

Powers.

A testator devised two houses and lots to two trustees, to receive the rents thereof, and to apply them to the maintenance of his daughter's children, with a direction to sell after his youngest grandchild should have attained its majority. Before that time both trustees died, and the complainant was appointed by the orphans court to execute the trust, the order of his appointment providing that he should not sell the premises without giving additional security. After the youngest grandchild was twenty-one years old, he gave the additional security, which was approved by the orphans court, and sold the property at public sale, the defendant buying one of the houses. On a bill by the trustee for specific performance—*Held*, that, under the statute, the order of the orphans court conferred upon the complainant the power of sale vested by the will in the original trustees, and that the defendant must carry out his purchase. *Yard v. Larison*,

386

Practice.

1. A defendant arrested, and in custody under a *ne exeat*, may, before answer, apply for the discharge of the writ on affidavits. *Cary v. Cary*,
2. Statements by a defendant who was subsequently arrested on a *ne exeat*, made to complainant's lawyer, that if suits should be begun against him, and he should be likely to get the worst of it, or if

3

Practice—Continued.

any order should be made against him by any court, his (defendant's) lawyer would find it out beforehand and would let him know, so that he could and would leave the state before they could do anything with him, accompanied by other statements to the effect that complainant and her father were both poor, and that he would law them both to death if they attempted any suits against him, and that he had put all his property out of his hands, but still had the benefit of it, are sufficient, on an application for his discharge, to hold him in custody under the *ne exeat*.
Cary v. Cary,

20

3. Where the insufficiency of proof is due to the inadvertence of counsel, a cause may be ordered to stand over, after final hearing, for the purpose of supplying the additional proof. *Sharp v. Wyckoff*,

95

4. An appeal was taken on July 9th, the complete record was filed in the surrogate's office on September 16th, and on October 15th, the first day of the term, the appeal was dismissed because the appellant had not filed here a transcript of the proceedings below. On a motion to re-instate the appeal—*Held*, (1) that notice of the motion to dismiss the appeal was not necessary; (2) that if appellant had needed additional time for filing his transcript, he ought to have applied therefor promptly. *Terhune v. Pinkney*,

494

5. The proper practice in chancery is to send an issue on the legal title to be tried at law, or to retain the bill until an action can be brought at law to try the legal title, or until an action pending at law for that purpose can be determined; and the court of equity can so control the action at law that the legal question may be decided. If the parties waive a trial at law, the court of equity is at liberty to decide the question for itself. *Freiknecht v. Meyer*, 551
 6. *Tusto v. Klopping*, 14 Vr. 448, re-affirmed. *Id.*, 551
- See EVIDENCE, 2, 3; ISSUE AT LAW.

Presumption.

See FRAUD, 1; MORTGAGE, 2.

R.**Receiver.**

A manager was employed by the receiver of an insolvent railroad company mainly to perform duties which the receiver himself should have attended to. In a subsequent order for the disposition of the proceeds of the foreclosure of a mortgage on the railroad, an amount was awarded to the receiver as compensation for his services, and he was thereby directed to pay the manager a specified portion thereof. He refused to do so, claiming that the manager was indebted to him individually in a larger amount.

Receiver—Continued.

—*Held*, the indebtedness from the manager to the receiver being admitted, that a petition by the manager for an order compelling the receiver to pay him the amount specified should be dismissed for want of equity. *Gatzner v. Philadelphia and Atlantic City Railway Co.*, 363

See JURISDICTION, 2.

Reformation of Contracts.

See FRAUD, 4; INSURANCE.

Riparian Rights.

1. The pre-emption given by the eighth section of the riparian act of 1860, to the riparian owners, is of grace, and not of right. *American Dock and Improvement Co. v. Trustees of Public Schools*, 409
2. The thirteenth section of that act was designed for the benefit of riparian owners who, after notice, neglected to apply for the grant, and the grant has consequently been made to some one else, and the rights of the riparian owner to compensation is by the act made to depend upon whether, in law, he had such a right or interest as would make compensation to him necessary in order to enable the state to make the grant. *Id.*, 409
3. The legislature had the power to rescind the provision for pre-emption, and in the case of the West Line grant it did so by the special grant above mentioned. It had also the power to repeal the provision for compensation. *Id.*, 409

Rules.

- 214—*Crammer v. Atlantic City Gas and Water Co.*, 76
 215—*Kirkpatrick v. Corning*, 22
 218—*Demarest v. Vanderberg*, 135

S.**Sale.**

1. If a vendor conceals from the vendee some fact material to the interest of the vendee, which is within the knowledge of the vendor, and which it is his duty to disclose, the concealment is fraudulent, and vitiates the sale. *Keen v. James*, 527
2. A duty to disclose exists when it expressly appears, by the language of the parties, or is necessarily implied from the circumstances of the case, that one party is actually reposing trust and confidence in the other, and the latter knows it. *Id.*, 527
3. When a vendor, before and without reference to any sale, has published false statements touching the value of the article sold, and in the negotiations for sale he is apprised that the vendee has heard those statements, and is relying on their truth in making his purchase, and has no available means of ascertaining

Sale—Continued.

their falsity, silence on the part of the vendor is a fraudulent concealment vitiating the sale. *Id.*, 527

4. When a sale of bank stock, belonging to an estate, was effected by one of three executors through a fraudulent concealment—*Held*, that the vendee could rescind the sale, and was entitled to a decree against all the executors for re-imbursement out of the estate, not only of the purchase-price, but also of any assessments upon the stock which he had been legally compelled to pay as shareholder. *Id.*, 527

Setting Aside Contracts.

See ACCIDENT, 1.

Set-Off.

See HUSBAND AND WIFE, 6 ; RECEIVER, 1.

Solicitor.

Under the statute authorizing the assignment of counsel to indigent suitors, the complainant was assigned to assist the defendant in a suit to recover from a life insurance company the amount of a policy on her husband's life. The complainant thereupon made an agreement with her to prosecute the claim ; and if successful, to receive one-half of the amount recovered, and if not successful, to receive nothing. He did prosecute the suit, paid the costs incurred, and recovered the amount of the policy, \$1,000, besides \$339.27 interest thereon.—*Held*, that he was entitled to one-half of this whole amount. *Hassell v. Van Houten*, 105

See ATTORNEY ; MORTGAGE, 1 ; PRACTICE, 3.

Sovereignty.

If property, by reason of forfeiture, revert to the state, it alone can take advantage thereof. *American Dock Co. v. Trustees*, 409

See EVIDENCE, 4 ; RIPARIAN RIGHTS, 3.

Specific Performance.

1. A court of equity may, in a proper case, decree the specific performance of a contract to renew a license. *Domestic Telegraph and Telephone Co. v. Metropolitan Telephone and Telegraph Co.*, 160
2. Specific performance of a contract will not be decreed, unless the contract has actually been concluded ; or, if any material part of it still rests in treaty, and remains to be settled by further negotiations, equity will not interfere. *Id.*, 160
3. No court has power to make a contract for persons *sui juris*, nor to compel them to agree with each other. *Id.*, 160
4. Where an injunction is sought in aid of action for specific performance, if the complainant's case is strong enough to render it

Specific Performance—Continued.

at all probable that the complainant may, on final hearing, be able to convince the court that he is entitled to relief, the court will, as a general rule, award the writ, but will refuse it in cases where it appears that the contract sought to be enforced has not yet been made, or, if made, that it is so incomplete or uncertain as to be unenforceable. *Id.*, 160

5. When, on decree for specific performance, the defendant is in contempt for refusal to perform, the court may give it effect by establishing the contract as if it had been executed; and by enjoining and restraining the defendant from denying its execution and delivery; and from defending himself in any action by denying its execution. *Wharton v. Stoutenburgh*, 299

See FRAUD, 4; JURISDICTION, 3.

Statutes.

Where there are two statutes on the same subject, passed at different dates, and it is plain from the frame-work and substance of the last that it was intended to cover the whole subject, and to be a complete and perfect system in itself, the last act must be held to be a legislative declaration that whatever is embraced in it shall prevail, and that whatever is excluded is discarded and repealed. *Bracken v. Smith*, 169

Statutes of New Jersey (Private).

Camden County Clerk, *P. L. of 1874 p. 280*, 127
 Newark Savings Institution, *P. L. of 1847 p. 108*, 186
P. L. of 1859 p. 5, 186

Statutes of New Jersey (Public).

Chancery, *Rev. p. 109 § 31*, 23
Rev. p. 118 § 78, 120, 563
 Chattel Mortgages, *Rev. p. 709 §§ 39, 40*, 170
P. L. of 1878 p. 139, 169
P. L. of 1880 p. 266, 170
P. L. of 1881 p. 266, 169
 Clerks of Counties, *Rev. p. 1278*, 392
P. L. of 1876 p. 289, 80, 127
P. L. of 1882 p. 195, 80, 127, 392
P. L. of 1885 p. —, 391
 Conveyances, *Rev. p. 167 § 32*, 350
 Corporations, *Rev. p. 187 § 59*, 419
 Descents, *Rev. p. 299 § 10*, 89
 Dower, *Rev. p. 321 § 2*, 487, 508
Rev. p. 322 § 16, 143
 Evidence, *Rev. p. 378 § 3*, 131
Rev. p. 378 § 4, 131
P. L. of 1880 p. 52, 43, 48, 132, 253

Statutes of New Jersey (Public)—Continued.

Health, Boards of,	<i>P. L. of 1880 p. 206,</i>	221, 574
	<i>P. L. of 1881 p. 160,</i>	220, 574
	<i>P. L. of 1883 p. 122,</i>	221, 573
Infants,	<i>Rev. p. 483 § 10,</i>	35
Limitation of Actions,	<i>Rev. p. 599 § 27,</i>	420
Married Women,	<i>Rev. p. 639 § 14,</i>	213
Municipal Corporations,	<i>P. L. of 1881 p. 118,</i>	374
	<i>P. L. of 1884 p. 324,</i>	374
Atlantic City,	<i>P. L. of 1866 p. 318,</i>	369
Trenton,	<i>P. L. of 1874 § 25,</i>	571, 573
Orphans Court,	<i>Rev. p. 776 § 110,</i>	265
	<i>Rev. p. 776 § 112,</i>	233
	<i>Rev. p. 777 § 114,</i>	389
	<i>Rev. p. 778 § 118,</i>	258
	<i>Rev. p. 791 § 129,</i>	257
	<i>Rev. p. 781 § 131,</i>	257
Partition,	<i>Rev. p. 801 § 25,</i>	547
	<i>Rev. p. 802 §§ 26, 29,</i>	548
	<i>Rev. p. 802 § 30,</i>	548
Riparian Rights,	<i>Rev. p. 980,</i>	413, 443
Taxes,	<i>P. L. of 1879 p. 54,</i>	2
	<i>P. L. of 1881 p. 194,</i>	61
	<i>P. L. of 1882 p. 120,</i>	2
Titles,	<i>Rev. p. 1189,</i>	61, 62
Water Works,	<i>Rev. p. 1365,</i>	369
Wharves,	<i>Rev. p. 1240,</i>	413, 444

Statutes of France.

Code Napoleon,	§§ 1391, 1400, 1497,	281
	§§ 1399, 1401, 1421, 1422, 1423, 1453,	
	1467, 1480,	282
	Art. XIII,	285
	Art. LXXIV,	287

Statutes of United States.

Bankrupt Act,	<i>Rev. Stat. p. 969 § 4972,</i>	200
	<i>Rev. Stat. p. 981 § 5046,</i>	200
National Banks,	<i>Rev. Stat. p. 995 § 5151,</i>	531
	<i>Rev. Stat. p. 999 § 5152,</i>	545
	<i>Rev. Stat. p. 1007 § 5211,</i>	530, 538

Taxes.

A statute directing that taxes assessed upon property held in trust or for life &c., should be assessed in the name of the person entitled to the beneficial interest or income thereof, does not authorize an assessment against "the chancellor in trust," in respect to a mortgage given to the chancellor, the interest whereon is payable

Taxes—Continued.

for life to one who is still living, and the principal thereof, after her death, payable to the chancellor. *Ming's Case*,

1

See EXECUTORS, 7; HUSBAND AND WIFE, 1.

Tender.

A preliminary notice is not requisite to a tender of money on a past-due obligation. *Sharp v. Wyckoff*,

376

Time.

See APPEAL, 1; PRACTICE, 4.

Trusts and Trustees.

1. General, indefinite verbal statements by a trustee are insufficient to fasten the trust funds upon his individual real estate. *Cuming v. Robins*,

46

2. The income of a testamentary trust fund was given to a testator's wife for her life or widowhood, for the maintenance of herself and children, with a provision, among others, that if the children should be of age at the time of their mother's death or remarriage, the principal of the fund should be equally divided among them. They are now all of age, and their mother survives, unmarried.—*Held*, that, upon the application of the mother and children, the moneys derived from the condemnation of part of the lands covered by the trust for the purposes of a railroad company, could be devoted to erecting a building on another part of the lands covered by the trust, the present buildings whereon are very dilapidated. *Matthews v. Dellicker*,

90

3. A husband conveyed lands to his wife, to hold in trust (evidenced by deed) for his benefit during his lifetime, and thereafter to sell the lands and divide the proceeds among his widow, should she survive him, and their children or grandchildren.—*Held*, that the husband and wife could not substitute for the trust as to those lands another trust, so as to affect the interests of the children and grandchildren. *Gulick v. Gulick*,

401

4. A testator gave to his son (the defendant) all the implements, materials &c. in his oil-cloth factory, which were to be valued at cost, and sufficient money added to such valuation to make a total of \$30,000. He then gave to trustees (the complainant) all the residue of his estate, to permit defendant to use and enjoy the land and buildings constituting his oil-cloth factory, without rent or charge, so long as defendant carried on the business alone, without a partner, the defendant to pay all taxes thereon and keep the works in good repair, make all improvements and keep the same insured at his own expense, otherwise the premises were to be sold &c. The defendant received the tools, stock &c., and also the money, which, added to the valuation, made up the \$30,000. The factory itself was appraised at \$14,000. The

Trusts and Trustees—Continued.

complainant expended \$2,000 in finishing buildings which were unfinished at the testator's death. The cost of the factory, including that expenditure and the cost of the land, was \$21,000. The defendant has complied with all the conditions of the trust relative to the taxes, repairs and insurance. He expended, prior to December 31st, 1881, \$3,660 in new buildings and machinery and repairs. All the buildings were insured in the complainant's name as trustee. In 1881 one of the buildings, with the machinery therein, was destroyed, and portions of others of the buildings injured, by fire, and the proceeds of the insurance, about \$6,000, were paid by the companies to the trustee, and were by him paid to defendant, who expended that and also about \$18,000 of his own money in new buildings and machinery, built partly on the trust land and (as to one building) partly on his own adjoining land. The value of the buildings &c. on the trust property has been doubled by the defendant, and new buildings &c., including cost of land, worth \$48,000, erected on his own property adjoining, and used by him in connection with the original factory, all of which have been insured by defendant in complainant's name. In 1884 the paint-shop was again burnt, and almost all the other buildings so damaged that manufacturing was suspended until after they had been repaired. The loss was adjusted at \$29,000, and complainant has received thereof \$21,000, and paid \$11,000 to defendant, who has begun to rebuild, and in doing so has placed one of the buildings, in part, on his own land; but even if such part should be severed from the part on the trust lands, the latter would not be essentially impaired. The defendant's reasons for such location are to increase his facilities for business and to reduce the chances of loss by fire.—*Held*, that the defendant is bound to keep the premises insured to an amount equal to the original valuation of the trust buildings &c., and the value of the complainant's improvements, such insurance to be in the name of the trustee; that in making restorations, the plant on the trust property should be kept complete in itself, so that severance of the buildings thereon from those on the adjoining land would not destroy the usefulness of the former as an oil-cloth factory; that any improvements put upon the premises by the defendant are to be regarded as trade fixtures, and subject to removal by him or to allowance for their value; that as but an inconsiderable portion of one building is being erected on defendant's own land, the insurance-money may be applied thereto; that should the defendant fail to insure or repair the premises, or to pay the taxes thereon, the complainant ought to do so, and retain the cost from the defendant's income in his hands; and, finally, that as an infant is interested, the matter must be referred to a master to

Trusts and Trustees—Continued.

ascertain and report the facts, although complainant and defendant substantially agree as to them. *Wiley v. Morris*, 97

See COSTS, 1; EXECUTORS, 20; FRAUD, 3; FRAUDULENT CONVEYANCE; PARTIES, 4; POWERS; TAXES.

U.**Undue Influence.**

1. The testimony in the case was held to establish, clearly, the capacity of the testator to make a will. *Black v. Foljambe*, 234
2. That a wife requests her husband to appoint her one of the executors of his will, is not evidence of fraud or undue influence; nor the fact that the wife's sisters, one of whom testator was visiting, procured the attendance of the lawyer of one of them to assist testator's lawyer in drawing the disputed will. *Id.*, 234

See HUSBAND AND WIFE, 3; WILLS, 1.

V.**Variance.**

Parties who, in their pleadings and proofs, have insisted that they were not accountable to complainant for the rental value of land of which the ancestor died seized, because they were in possession as equitable owners, cannot, at the hearing, shift their ground, and claim that they were tenants of the ancestor's widow, who might have been entitled to hold the land until her dower was assigned, but who has disclaimed such a right. *Larison v. Polhemus*, 303

W.**Waiver.**

See ESTOPPEL, 3; MORTGAGE, 4.

Water Rights.

1. A natural watercourse may be created by the flow of surface water. *Kelly v. Dunning*, 482
2. A land-owner has no right to cause the natural discharge of surface water, from his land on that of his neighbor, to be changed, to the injury of the latter, by conducting it through new channels, in unusual quantities, to the land of his neighbor. *Id.*, 482

See CORPORATION, 2; NUISANCE; RIPARIAN RIGHTS.

Ways.

See DEDICATION; EASEMENT; EMINENT DOMAIN.

Wills.

1. A bachelor, seventy-two years old, while in a moribund condition, signed a paper purporting to be his will, and giving all of his

Wills—Continued.

property to his housekeeper, who had lived with him for many years. The paper had been prepared by her four years before, and she testified that he had put off executing it, although meanwhile frequently requested by her to do so. On the day when he signed it, she sent for the witnesses, and told the attending physician that if the testator was not going to live, she wanted to have a paper signed. None of the testator's brothers and sisters was present, or informed of the making of the will, although one brother lived in the adjoining house. To one of the witnesses, in reply to a remark that they had come to witness his will and supposed he knew all about it, he replied that he did not know anything about it. The evidence as to his intentions in disposing of his property was conflicting.—*Held*, that the paper should be refused probate, on the ground of want of capacity and undue influence. *Byard v. Conover*,

244

2. In February, 1876, a will was executed by a widow, who was then about eighty-two years old, and blind. In November, 1878, an inquisition of lunacy found that she was then of unsound mind, and had been so for three years preceding. Her testamentary capacity, at the time when her will was made, was, nevertheless, shown and established by the testimony of witnesses, and the orphans court decree ordering her will to be admitted to probate was affirmed. *Brady v. McBride*,

495

See DEVISE; HUSBAND AND WIFE, 4; UNDUE INFLUENCE.

Words.

"Adjoining,"	435
"Held,"	547
"Investments,"	186
"Issue,"	89
"Jus,"	560
"Lawful Heirs,"	14. 463
"Near,"	435
"Sell and Assign,"	207
"Revert,"	463

UC SOUTHERN REGIONAL LIBRARY FACILITY



D 000 551 699 2

